Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (a) May a state court rule, contrary to this Court's holdings in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that landowners who are prevented from improving and using their land for a family home by invalid and unconstitutional land use regulations – found by the court to be invalidly imposed by a government agency *acting without jurisdiction* – may be denied 5th Amendment just compensation for the resulting regulatory taking of their land?

(b) May a state court rule that the supposed "remedy" of landowners subjected to jurisdictionally invalid and unconstitutional regulations is to knuckle under to the unlawful government demands and forego lawful use of their land on pain of losing their right to seek just compensation in court?

2. May a state court rule, contrary to this Court's holdings in *First English*, *Lucas* and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that unconstitutional land use regulations that deny landowners all economically beneficial use of their land for many years do not justify 5th Amendment compensation for a taking if the regulators (who lack jurisdiction to act) can come up with some arguable – albeit invalid – basis for their action?

3. May a state court nullify this Court's holding in *First English* (that the 5th Amendment compels compensation for the period of time *before* a confiscatory regulation is struck down), by ruling that no compensation can ever be constitutionally due until *after* a court invalidates the regulation?

LIST OF PARTIES

In addition to the parties listed in the caption:

John Buckley.*

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* John and Peggy Ann Buckley have divorced since the underlying incidents occurred and have been represented by separate counsel at bench.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Peggy Ann Buckley respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the California Court of Appeal, Second Appellate District, Division Two.

OPINIONS BELOW

The decision under review was filed on Dec. 1, 1998, and is reported as *Buckley v. California Coastal Commn.*, 68 Cal.App.4th 178, 80 Cal.Rptr.2d 562 (1998). (App., p. 1.) Petitions for Rehearing were denied in an unreported order filed Dec. 28, 1998. (App., p. 35.) The California Supreme Court denied review in an unreported order filed Feb. 24, 1999. (App., p. 36.) The trial court's unreported Statements of Decision, filed Nov. 18, 1993 and April 6, 1995, and Judgments, filed Dec. 17, 1993 and July 12, 1995 (after a bifurcated trial), are at App., pp. 38, 47, 45, and 59 respectively.

This was the second round of appeals in this case. Earlier, the Court of Appeal had issued an opinion on Oct. 15, 1997, reported at 68 Cal.Rptr.2d 146. The California Supreme Court granted review on Jan. 28, 1998 and then, on July 8, 1998, transferred the matter back to the Court of Appeal with directions to reconsider it in light of the Supreme Court's recent decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006 (1998) (App., p. 37).[1]

JURISDICTION

This case arises from the California courts' refusal to follow this Court's 5th Amendment decisions and their refusal to provide a compensatory remedy for a regulatory taking of property. Here, as both courts held below, the California Coastal Commission had no jurisdiction over Mr. and Mrs. Buckley's property, but purported to regulate it anyway so as

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[1] As a matter of California law, the Court of Appeal's decision was vacated when the Supreme Court granted review and transferred the matter for reconsideration.

to deny them the use of their land. (App., pp. 14, fn. 4; 15.) When the Commission insisted on interfering with the construction of a home on the Buckley property – by repeatedly issuing "stop work" orders to the contractors and threatening to impose huge fines and punitive damages on them and the Buckleys – the Buckleys sued, seeking compensation for the *de facto* taking of their property under the 5th Amendment.

The trial court awarded such compensation for the Commission's denial of use of the Buckleys' land. The Court of Appeal affirmed the adjudication that the Commission had acted illegally and without jurisdiction, but nonetheless reversed the compensatory remedy. Compelled to rely on the California Supreme Court's recent decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, *cert. den.*, 142 L.Ed.2d 146 (1998), the Court of Appeal held that the Commission's "mistaken" assertion of jurisdiction could not result in a taking. It also held that, since the Commission improperly asserted jurisdiction over only part of the Buckleys' land, there was no taking because they could have knuckled under to the illegal assertion of regulatory power and built something on the remainder of their land.

Landgate is central to the case at bench. In it, the California Supreme Court simply refused to apply this Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and ruled that – as a matter of law – no taking could occur during the period of time between a government agency's wrongful regulatory action and the time a court held it unconstitutional. That is directly contrary to this Court's clear holding in *First English*. (See pp. 15-17, *infra*.) Because the decision below was arrived at under the compulsion of *Landgate*, the decision in *Landgate* must be analyzed in this Petition in some depth.

The California Supreme Court denied review by a vote of 4-3, with Justices Baxter, Chin, and Brown dissenting. (App., p. 36.)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

Pertinent portions of State law are at App., pp. 73-76.

STATEMENT OF THE CASE

In early 1988, John and Peggy Ann Buckley bought a 2.75 acre lot in an unincorporated part of Los Angeles County known as Malibu. The lot was vacant and zoned for single-family residential development; it was surrounded by similar homes.

Although California's coast is generally subject to the regulatory jurisdiction of the California Coastal Commission, the Legislature has exempted lots in single-family areas from the Commission's jurisdiction. Those are regulated solely by the local government. The only prerequisite was that the local government formally grant exempt status to each individual lot. (Cal. Pub. Res. Code §§ 30610.1, 30610.2; App., pp. 73-76.) Los Angeles County did so for the Buckleys' entire lot on Oct. 24, 1989 (App., p. 64), and so notified the Commission.[2]

Accordingly, as of that date, the Commission lost jurisdiction over any part of the Buckleys' lot. All courts below agreed. (App., pp. 14, 61.) Apparently unwilling to relinquish authority over the Buckleys' property, the Commission falsely asserted that the rear part of the lot was "environmentally sensitive" and thus still under its control. As the trial court would find, the Commission had no evidence to support its

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[2] In August 1989, the Commission had told the Buckleys that they could not develop their lot unless they obtained *either* (1) a Commission permit *or* (2) a certificate of exemption from the County. Within two months, the Buckleys had done the latter.

assertion (App., p. 41), and all courts agreed that, in any event, the law does not permit the Commission jurisdiction over a portion of a lot. In short, the Commission's assertion of jurisdiction was utterly baseless.

Beginning in October 1989, the County duly issued grading and building permits to the Buckleys for their single family home. The County gave final approval in July 1990. In March 1991, more than eight months after the County had approved development, a landslide developed on the rear part of the lot, and the Buckleys prepared to repair it. But the Commission stopped them.[3] The Commission was aware of the need to repair the landslide to prevent serious damage to the property, but it nonetheless refused to permit the Buckleys' requested repairs and thereafter repeatedly blocked their efforts to do anything.

Notwithstanding its complete lack of jurisdiction over the property, the Commission, on March 26, 1991 – nearly a year and a half after the County issued its exemption certificate (App., p. 64) – hand delivered to the Buckleys and their contractor an order to "STOP WORK," that said "[n]o grading is permitted *on this property*," noting that the Commission had not issued a permit and ordering "all unpermitted work" to stop. (App., p. 67; underlining in original; italics added.) The Commission delivered another such stop work order to the property on June 11, 1991. (App., p. 68.) Each stop work order threatened to impose gargantuan fines and penalties on the Buckleys and their contractors; the initial fine would be $10,000, and it could be increased by $5,000 *per day*.

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[3] Although not required – because the Commission had no jurisdiction over their lot – the Buckleys did their best to work with the Commission between May 1990 and March 1991 to obtain Commission approval for their project (in an effort to avoid a costly, enervating battle with a willful and well-funded adversary). The Commission turned them down. The trial court found that it would have been futile for them to continue thereafter to submit additional plans to the Commission. (App., p. 53.) Given the Commission's demonstrated attitude, that finding cannot be gainsaid.

On Nov. 12, 1991, the County's Department of Public Works ordered the Buckleys to repair the landslide. As the Buckleys prepared to do so, the Commission delivered yet another stop work order on Dec. 5, 1991. Again, the order said that "[n]o grading or construction or landfill is permitted *on this property*," noted that the Commission had not issued a permit for any work, and ordered "all unpermitted work" to stop. (App., p. 70; emphasis added.)

The Commission's actions prevented the Buckleys from using, repairing, or selling their property. (App., p. 52.) They had become a shuttlecock between two regulatory agencies warring with each other over their regulatory turf: the County said "go," but the Commission said "stop."

The Buckleys sued the Commission for a taking of their property under the 5th Amendment,[4] and the Commission sued the Buckleys to "enforce" the Coastal Act and to collect the fines and penalties noted above.

The trial court found that the Commission had no jurisdiction over the property, that its actions were improper, that it presented no evidence that any part of the lot was environmentally sensitive or in need of the Commission's protection, and that the Commission's actions had taken the property without compensation in violation of the federal and state constitutions. (App., pp. 60-62.) Specifically, the court found that the Commission's illegal interference prevented the Buckleys from repairing the landslide, resulting in "egregious erosion" of a "continuing" nature that permanently took the property. (App., p. 52.) The trial court awarded the Buckleys $1,355,837 as just compensation and $831,495 for attorneys' fees and costs. (App., pp. 56, 62.)

The Court of Appeal agreed that the Commission had no jurisdiction over the Buckleys' property, but nonetheless reversed the compensatory award. The court reasoned that the

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[4] The federal question was thus raised at the earliest moment, and was argued throughout the trial and appellate briefing. Moreover, the trial court expressly held that the Buckleys' 5th Amendment rights were violated and the Court of Appeal reversed that holding.

Buckleys (a) could have acceded to the Commission's demands and built something on the front part of it (notwithstanding the stop work orders that referred to the entire lot),[5] and (b) were free to develop the entire lot as soon as the trial court ruled against the Commission (notwithstanding the Commission's continuing threats to seek ruinous fines and penalties), and therefore the property was not taken. Moreover, said that court, under *Landgate*, the Commission's "mistaken" assertion of jurisdiction could not, as a matter of law, be a taking, because no taking could begin until *after* the final conclusion of all litigation over the validity of the Commission's actions.

The California Supreme Court denied review by a vote of 4-3. (App., p. 36.) This Petition followed.

REASONS FOR GRANTING THE WRIT

I

FOR THE PAST TWENTY YEARS, CALIFORNIA HAS CONSISTENTLY DENIED 5TH AMENDMENT PROTECTION TO ITS LANDOWNERS AND HAS DEFIED THIS COURT'S HOLDINGS, RESULTING IN WIDESPREAD INJUSTICE AND AN UNDUE BURDEN ON THIS COURT. IT IS TIME TO CALL A HALT TO THIS MAVERICK JURISPRUDENCE

A

The Legal Climate in California Has Become Openly Hostile to the Constitutional Rights of Property Owners

This Court's repeated holdings notwithstanding, California insists on marching to the beat of a different 5th Amendment drummer. This is not just the Buckleys' perception.

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[5] At no time did the court below explain how the asserted "freedom" to knuckle under to an unconstitutional demand of a government agency acting without jurisdiction, somehow cured the deprivation of the Buckleys' constitutional rights effected by the agency's illegal demands that they stop all work on their property. It plainly did no such thing.

California holdings have become the subject of a drumbeat of criticism and, at times, derision by commentators on both sides of the issue. They have aptly characterized California's attitude toward land owners as "more hostile . . . than any other high court in the nation."[6] They concluded that California's attitude was "extreme,"[7] "onerous [and] draconian"[8] – in short, "the most restrictive state in the country with respect to land use."[9] Even commentators outspokenly sympathetic to government regulators concede that California's courts have

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[6] DiMento, *et al.*, *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 U.C.L.A.L. Rev. 859, 872 (1980). This article was written by eight highly knowledgeable authors, including the late UCLA law professor Donald G. Hagman, widely regarded as the leading land use legal thinker and analyst of his time and noted for his balanced position on the issues.

[7] Fischel, *Regulatory Takings: Law, Economics, and Politics* 226 (Harvard U. Press 1995). The author is a professor at Dartmouth College, and a highly regarded land economist of national stature.

[8] Callies, *The Taking Issue Revisited*, 37 Land Use Law & Zoning Digest 6, 7 (July 1985). The author, a professor of law at the University of Hawaii, was co-author of one of the most influential books on land use – one that was unequivocally written with a pro-regulation orientation. (See Bosselman, Callies, & Banta, *The Taking Issue* [Council on Environmental Quality 1973].) Professor Callies once summarized the California situation this way (citing examples): "We all know the California courts won't let landowners/developers build anything!" (Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 Urban Lawyer 723, 724 [1981].)

[9] Bauman, *The Supreme Court, Inverse Condemnation, and the Fifth Amendment*, 15 Rutgers L.J. 15, 70 (1983). The author has seen both sides of the issue, having served, at different times, as litigation counsel to the National Association of Home Builders and as Chairman of the Maryland-National Capital Park and Planning Commission (regulating land use in Montgomery County, Md.).

applied this anti-property owner bias "consistently," and that it "pervades the body of California zoning law generally."[10]

In 1987, this Court responded to California's idiosyncratic interpretation of the 5th Amendment. In reversing two California decisions during a two-week span, this Court noted how out of touch California law had become:

> "Our conclusion on this point is consistent with the approach taken by *every other court that has considered the question*, with the exception of the California state courts. [Citing numerous cases from other state and federal courts.]" (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 839 [1987]; emphasis added.)

This Court also plainly told California that it had not been following the 5th Amendment:

> " . . . the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 [1987].)
>
> "While the Supreme Court of California may not have actually disavowed this general rule . . . , we believe that it has truncated the rule by disallowing damages that occurred *prior to the ultimate invalidation of the challenged regulation*." (*First English*, 482 U.S. at 317; emphasis added.)

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[10] 1 Williams, *American Land Planning Law* § 6.03 at 115-116 (1974). Others openly gloated. See Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO Municipal L. Rev. 192-193 (1975), quoted with disapproval in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, fn. 22 (1981) (Brennan, J., dissenting, but expressing the substantive views of five Justices).

One commentator noted that *First English* "brought California, always at the fringe, in line with most other states."[11] Unfortunately, that turned out to be a triumph of pious hope over dismal reality.

Years later, nothing has changed; this Court's admonition notwithstanding, Californians' property rights remain very much a constitutional "poor relation." (Compare *Dolan v. City of Tigard*, 512 U.S. 374, 392 [1997].) A poll of land use experts on both sides of the issue found "California was a near unanimous choice as the state least likely to protect landowner rights. California municipalities . . . are accustomed to meeting little resistance from the state courts."[12] This merely confirmed what others had known already: California had become the butt of black humor in the national land use community. People elsewhere, it was said, "have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat."[13] In a more serious vein, these two knowledgeable commentators[14] went on to observe that, "[i]n California, the courts have elevated governmental arrogance to a fine art." (*Id.* at 263.) And so they have, the case at bench being the quintessential "Exhibit A."

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[11] Merriam, *A Planner's View of* Dolan, in *Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas*, ch. 10 at 211 (ABA 1996). The author is a noted pro-regulation advocate and a past president of the American Institute of Certified Planners.

[12] Coyle, *Property Rights and the Constitution* 11 (State U. of N.Y. Press 1993).

[13] Babcock & Siemon, *The Zoning Game Revisited* 293 (Lincoln Inst. of Land Policy 1985).

[14] The late Richard Babcock was, at the time, the recognized dean of the Nation's land use bar and – significantly – a vigorous defender of expansive government regulatory control.

B

California's Maverick Land Use Decisions Have Consumed an Inordinate Part of This Court's Scarce Resources – More Than All Other Jurisdictions Combined. It's Time to Align California's Takings Jurisprudence With the Rest of the Nation

The upshot of "elevat[ing] governmental arrogance to a fine art" is that California regulators do as they please.[15] After all, with a compliant judiciary that is willing to shield them from accountability to the Constitution, even if it means defying this Court's pronouncements, they believe that they have little to fear. The foreseeable result is more draconian regulation[16] that inspires more litigation. Abused property owners who are backed into a corner feel they have nothing to lose and file suit in the face of odds heavily against them.

And that brings cases here. Lots of them. A review of this Court's docket since 1978, when the modern era of this Court's regulatory taking jurisprudence began, reveals this startling fact: *land use cases arising in California account for more of this Court's decisions in this field than those from all other jurisdictions combined.* Many of the household names in 5th Amendment law arose in California: *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v.*

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[15] As Professor Coyle observed: " . . . the basic message of the [California Supreme] court was 'Do what you want.' " (Coyle, *supra*, p. 156.)

[16] It has been noted by another leading scholar, Professor Bernard Frieden, then Chairman of the Planning Department at M.I.T., that California land use laws have been freely abused so that, while paying lip service to "good planning," they were in fact applied to advance the narrow, parochial self-interest of vocal suburbanites. (Frieden, *The Environmental Protection Hustle* [M.I.T. Press 1979].)

County of Los Angeles, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 827 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Ehrlich v. Culver City*, 512 U.S. 1231 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235 (argued Oct. 7, 1998; decision pending).[17]

When the eleven cases decided by this Court from California are compared to only ten land use regulatory taking cases arising in *all other jurisdictions combined*,[18] it is apparent that something is alarmingly amiss in California. One state – no matter how large and populous – should not account for more cases in this Court than the other sixty-two jurisdictions combined.[19] And this Court alone knows how many unsuccessful petitions have been filed seeking review of additional California decisions.

The reason for this lopsided caseload is apparent: as Babcock and Siemon put it, the California judiciary's abject deference to local land use regulators has encouraged "governmental arrogance" (Babcock & Siemon, *supra* at p. 263), and has led to a regulatory climate in which abuse of landowners' rights is unexceptional. This Court now has the opportunity to respond by relieving California's property owners of their status as constitutional "poor relations" (see

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[17] Although *Del Monte Dunes* came from the federal court system, it was in court because of the mistreatment a California city meted out to the property owner – mistreatment emboldened by the California judiciary's historic deference to regulators.

[18] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997).

[19] This figure is the sum of the other 49 states plus the 13 federal circuits.

Dolan, 512 U.S. at 392) and, in the process, unburden its own docket from this unseemly avalanche of California land use cases. It is time to tell California that it is, after all, a part of the Union.

C

In the Past Year, California Has Repeatedly Thumbed Its Judicial Nose at This Court's Decisions, Ignored This Court's Considered Holdings, and Restored California Takings Law to its Anti-Property Owner Bias of the Early 1980s

There is no way to say this except plainly: in a series of cases culminating during the last year, California has defiantly restored its law to what it was in 1986 – i.e., *before* this Court corrected California's deviance through *Nollan* and *First English*. It has *de facto* nullified this Court's holdings, and has undermined whatever progress this Court made in the last two decades in bringing clarity to the law of regulatory takings.[20]

The criticism and recognition of this new California reality has now gone beyond academics and practitioners. The California Supreme Court is irreconcilably split: three of its seven members have, in forceful language, exposed the California position for what it is.

Charging California with refusing to follow this Court's constitutional decisions on regulatory takings, Justice Janice

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[20] It has also undermined this Court's procedural decision in *Williamson County* that regulatory taking cases be fought primarily in state courts "*if* a state provides an adequate procedure for seeking just compensation. . . . " (*Williamson County*, 473 U.S. at 195.) As now seems obvious, California no longer provides even a theoretically "adequate procedure for seeking just compensation" – having declared itself unaffected by this Court's fundamental holdings – leaving California property owners no alternative but to seek relief in federal courts. (See, e.g., *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 [9th Cir. 1990]; *Hoehne v. County of San Benito*, 870 F.2d 529, 533-534 [9th Cir. 1989].)

Rogers Brown put it bluntly, but accurately: "in California, at least for now, *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] is a dead letter." (*Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, 1043 [1998] [Brown, J., dissenting].) This was based on the California majority's "conviction that more than a decade of reinvigorated [United States Supreme Court] takings jurisprudence has changed nothing" (*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 1024 [1999] [Brown, J., dissenting]), a conviction born of the "evident" fact that the California "majority is unwilling to come to terms with the true meaning and operative effect of *Lucas* and *First Lutheran*." (*Landgate*, 17 Cal.4th at 1041.)

Justice Marvin Baxter, in a lengthy and scholarly discussion of this Court's takings jurisprudence, demonstrated that the California majority simply refuses to follow this Court's decisions. (*Santa Monica Beach*, 19 Cal.4th at 983-1018 [Baxter, J., dissenting].) Unmasking the majority's effort to disguise its handiwork[21] as seemingly in compliance with this Court's teachings, Justice Baxter concluded simply that "[t]he assumption of the majority that just compensation need not be paid . . . finds no support in the authorities on which they rely." (*Id.* at 1003.) "Two centuries of jurisprudence since *Marbury v. Madison* . . . have escaped notice." (*Id.* at 1014.)

With respect to this Court's seminal decision in *First English*, (a) establishing that the constitutional remedy for a regulatory taking is compensation and (b) holding that temporary takings are entitled to the same constitutional protection as permanent takings, Justice Ming Chin demonstrated that the current California position not only ignores this Court's holding, but actually embraces the *dissent* in *First English*. (*Landgate*, 17 Cal.4th at 1034 [Chin, J., dissenting]; see also 17 Cal.4th at 1039 [Brown, J., dissenting].)

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[21] Such subterfuge is an old California tactic in this field. As this Court noted in *First English*, "the California Supreme Court may not have *actually disavowed*" the constitutional mandate, but its holdings "truncated the rule." (*First English*, 482 U.S. at 317; emphasis added.) Here, the words may be different, but the tune is the same.

It is hard to improve on Justice Brown's observation that:

> "when [the United States Supreme Court] has made an attempt to resolve definitively a difficult point of constitutional law that is applicable to the very issue before us, we ought either to respect its judgment or provide a reasoned basis for refusing to do so. To do otherwise, in Charles Fried's words is 'judicial impudence.' [Citation.]" (*Landgate*, 17 Cal.4th at 1035 [Brown, J., dissenting].)

California law has thus been plunged into such "a state of confusion" (*Santa Monica Beach*, 19 Cal.4th at 983 [Baxter, J., dissenting]), that Justices on both sides of the California divide have urged this Court to resolve matters, "preferably sooner rather than later" (*Santa Monica Beach*, 19 Cal.4th at 1035 [Brown, J., dissenting]). While it is not surprising that a dissenter would do so, a member of the majority has also acknowledged the presence of questions that "only" this Court can resolve and, "given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises." (*Santa Monica Beach*, 19 Cal.4th at 982-983 [Kennard, J., concurring].)

As shown more fully *post*, California is now openly defying this Court's interpretation of paramount constitutional authority. It has embraced a "rule" that was flatly rejected by this Court in 1987, and espoused then only by Justice Stevens' dissent. The fact that three of California's seven Supreme Court Justices are refusing to join that intellectual rebellion, and are protesting in such strong language, highlights it for all to see. Those same three Justices dissented when the California Supreme Court denied discretionary review in this case. (App., p. 36.)

The line has been plainly drawn in the California sand. It should be apparent that only an unequivocal response from this Court can restore constitutional primacy west of the Colorado River. As things stand now, California courts have performed the intellectual equivalent of firing on Fort Sumter, and thus far – alas – they have gotten away with it. It is high time to put this unfortunate judicial *ante bellum* attitude to an

end. Judges "in every state" (U.S. Const., Art. VI, cl. 2) are bound by the Constitution (see *Cooper v. Aaron*, 358 U.S. 1, 18 [1958]), and that includes California. What is at stake here is the integrity of the rule of law.

II

AS EXEMPLIFIED BY THE OPINION BELOW, CALIFORNIA'S COURTS GIVE ONLY LIP SERVICE TO THIS COURT'S CONTROLLING DECISIONS IN CASES SUCH AS *FIRST ENGLISH* AND *LUCAS*. THE PROTECTION PROVIDED BY THE 5TH AMENDMENT IS IN FACT NOT AVAILABLE TO CALIFORNIA'S LANDOWNERS

To see California's open rebellion, one need go no further than to compare this Court's analysis in *First English* with the 1998 decision in *Landgate*. In *First English*, this Court reviewed – and rejected – California's rule that the remedy for a regulatory taking was to invalidate the regulation. This Court held that compensation was constitutionally mandated. (*First English*, 482 U.S. at 315, 322.) When it overruled California's unconstitutional rule, this Court did so *precisely* because California refused to permit compensation for the period *before* judicial invalidation that a regulation kept private property from being put to economically productive use. The California rule that this Court consigned to the constitutional scrap heap in 1987 is *precisely* what the California Supreme Court resuscitated in *Landgate* and the Court of Appeal applied in the case at bench. The deliberate nature of California's intellectual insurrection is apparent when one reads *First English*. This Court could not have been clearer in its opening paragraph, which left no doubt as to the issue before it, the correct rule, and California's disregard of it:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a 'taking' of his property*. We disagree, and conclude that in

> these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would *require compensation for that period*." (*First English*, 482 U.S. at 306-307; emphasis added.)
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> "While the Supreme Court of California may not have actually disavowed this general rule . . . , we believe that it has truncated the rule *by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation*." (*First English*, 482 U.S. at 317; emphasis added.)[22]

First English thus holds that, once the regulatory action is administratively final, compensation is constitutionally compelled for the period *during litigation that determines the invalidity of the regulation* when its impact is to prevent all economically productive use of the regulated land.[23] California, however, has simply nullified this Court's teaching. It has defiantly re-established pre-*First English* law by holding that the aggrieved landowner must first sue to invalidate the regulation, and that such a litigational period is merely part of the "normal delay" in the "planning process" and cannot – regardless of the illegality of the regulation and its effect on the property owner – result in a constitutional taking that requires compensation. (*Landgate*, 17 Cal.4th at 1010.) Once again, California has "truncated the [constitutional] rule" (*First English*, 482 U.S. at 317) by refusing compensation for

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[22] See *Id.* at 319 [5th Amendment "requires" payment for losses "during this period"]; *id.* at 322 [payment for the use of the property "during this period" is constitutionally mandated].

[23] In *Williamson County*, this Court was explicit that, once administrative finality is achieved, the case is ripe, then and there (473 U.S. at 186-187), and it is *not* necessary for the aggrieved landowner to seek non-monetary judicial review remedies before suing to seek just compensation. (See also *Preseault v. I.C.C.*, 494 U.S. 1 [1990] [challenge to constitutionality of statute is not ripe until after landowner seeks just compensation].) California, however, has obverted that rule as well, holding that aggrieved owners must exhaust *all* administrative *and* judicial remedies before being able to seek just compensation. (See *Hensler v. City of Glendale*, 8 Cal.4th 1, 10 [1994].)

this period. And this time it did so knowingly, in spite of three dissenters forecefully demonstrating the conflict with *First English*.

Not only does the California position conflict with *First English*, it conflicts with other state court decisions. See, e.g., *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. App. 1994). In each of these cases, the courts held that a taking claim is ripe when administrative proceedings have concluded and a final administrative decision has been made. As the Connecticut Supreme Court put it, "It is unnecessary for the plaintiff to await *judicial review* of the administrative action" because, as this Court held in *First English*, invalidation of the regulatory action would not suffice to provide the constitutionally-mandated compensation. (*Cumberland Farms*, 247 Conn. at 213; emphasis in original.)

This Court's decision in *Lucas* fared no better at the hands of the California court. In *Lucas*, this Court held that denial of all economically beneficial or productive use of property, whether permanent or temporary, is a "categorical" *per se* taking that requires compensation. (*Lucas*, 505 U.S. at 1015.) Under California's newly resurrected pre-1987 rule, however, even such a drastic impact *cannot* be deemed a taking if the "development restrictions on the subject property substantially advanced some legitimate state purposes[24] so as to justify the denial of the development permit." (*Landgate*, 17 Cal.4th at 1022.)[25]

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[24] Of course, how there can be a "legitimate" governmental purpose when, as here, an agency acts unconstitutionally and without jurisdiction (i.e., beyond the purview of its legitimate powers) no one has bothered to explain.

[25] *Landgate* is the key here because the court below simply applied *Landgate*'s rationale. As the court below noted, somewhat self-consciously:

California's current test applied in the case at bench is thus contrary to *Lucas*. Indeed, it is contrary to *Agins*, where this Court first announced disjunctively that a taking occurs if a regulation *either* denies the property owner economically viable use *or* fails to substantially advance a legitimate state interest. (447 U.S. at 260.) Both here and in *Landgate*, the California courts *de facto* overruled *Agins* and twisted this Court's disjunctive test into a conjunctive one. It is now not enough to prove that the government denied all economically productive use for a period of years (at bench, the period is now 10 years); landowners would also have to prove that there was no legitimate state interest served. That distortion of *Agins* and defiance of the *Lucas* test rightly drew the California dissenters' ire. They concluded that the California position is "flatly incompatible with *Lucas*." (*Landgate*, 17 Cal.4th at 1042; Brown, J., dissenting.) They are right. And they are not alone. The most recent book published about regulatory takings agrees that *Landgate* is contrary to *Lucas*:

> "[T]he [*Landgate*] majority said such reasonable errors are a normal part of the regulatory process. By contrast, agency error *would* be a taking under *Lucas* if it indefinitely eliminated all use of the property, just as an authorized agency action would be." (Meltz, Merriam, & Frank, *The Takings Issue* 79 [Island Press 1999]; emphasis added.)[26]

> "*For better or for worse*, in a four-to-three decision, the [California Supreme Court] majority held that a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. [Citation.]" (*Buckley*, 68 Cal.App.4th at 200; App., p. 30; emphasis added.)

[26] This analysis contrasting *Landgate* with *Lucas* seems particularly significant here because one of its authors – Richard M. Frank – is a Senior Assistant Attorney General for California, and was one of the lawyers who convinced the California Supreme Court to rule as it did in *Landgate*. (See 17 Cal.4th at 1009.)

The benefit of this Court's most fundamental takings decisions – decisions that took many years and monumental effort on this Court's part to create[27] – is being withheld from California's landowners. They are no less entitled to constitutional protection by this Court than landowners in other states – and far more in need of it.

III

CURRENT CALIFORNIA LAW CONFLICTS WITH THIS COURT'S DECISIONS BY HOLDING THAT NO TAKING CAN OCCUR – REGARDLESS OF THE ECONOMIC IMPACT OF THE REGULATORY ACTION – IF THE STATE HAD AN ARGUABLY LEGITIMATE BASIS FOR ITS ACTIONS

The decision below, building on the California Supreme Court's decision in *Landgate*, holds that there cannot be a regulatory taking as long as the government had an arguably legitimate basis for its actions. (App., p. 32; *Landgate*, 17 Cal.4th at 1022.)

Wrong.

This Court's jurisprudence has consistently held that takings are measured by the impact of the regulators' acts on the property owner, not their intentions. The government can no more confiscate private property for good reasons than for bad ones. Indeed, in *every* direct condemnation case, there is a finding of public use and public necessity. But the presence of those factors does not vitiate the Just Compensation Clause – on the contrary, it triggers its applicability. Justice Brennan's frequently cited opinion in *San Diego Gas* aptly encapsulated this Court's teachings with this quote from Justice Stewart:

> "[T]he Constitution measures a taking not by what a State says, or by what it intends, but by what it *does*." (*San Diego Gas*, 450 U.S. at 653 [Brennan,

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[27] Some of the tortured history is recounted in *First English*, 482 U.S. at 310.

> J., dissenting but expressing the substantive views of a majority]; quoting with approval from *Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring]; emphasis in original.)

The Court of Appeals for the Federal Circuit expanded on that thought:

> "The purpose and function of the [5th] Amendment being to secure citizens against governmental expropriations, and to guarantee just compensation for the property taken, what counts is not what the government said it was doing, or what it later says its intent was. . . . What counts is what the government *did*. [Citing *Hughes*.]" (*Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 889 [Fed. Cir. 1983]; emphasis in original.)

This Court has applied that bedrock constitutional philosophy repeatedly. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the New York Court of Appeals upheld a statute as a valid exercise of the police power. But commendable goals, like good intentions, are no substitute for adherence to the Just Compensation Clause:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (*Loretto*, 458 U.S. at 425; emphasis added.)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use. This Court disagreed and, in the process, explained the relationship between justifiable regulatory actions and the takings clause of the 5th Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress could assure the public a free right of access

> to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question.*" (*Kaiser*, 444 U.S. at 174; emphasis added; citations deleted.)[28]

And, of course, that concept is the underpinning for this Court's categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking. (*Lucas*, 505 U.S. at 1015; see *Agins*, 447 U.S. at 260.) That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.) In other words, for a taking to occur, it matters not whether the regulators acted in good or bad faith. What matters is the impact of their acts, not their motives. Indeed, it has long been settled that courts will not inquire into the motivation of political decisions to take private property, thus making their *bona fides* judicially off limits. (See, e.g., *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 [1923]; *Mugler v. Kansas*, 123 U.S. 623, 661 [1887].)

And yet, the rule applied in California (both below and in *Landgate*), is that when the regulators snuff out all reasonable private land use, requiring years of litigation to correct, the

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[28] In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate goals, had taken private property in violation of the 5th Amendment. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though legitimate*, nonetheless required compensation. This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking resulting from validly constructed government works is just compensation, not judicial second guessing of valid government policies and decisions.

property owner cannot even contend that a 5th Amendment violation occurred if the government can conjure up some objectively rational basis for its actions. (App., p. 32; *Landgate*, 17 Cal.4th at 1022.) That telescopes takings analysis into due process analysis, something this Court has expressly refused to do. (*E.g., Nollan*, 483 U.S. at 834, fn. 3; *Eastern Enterprises v. Apfel*, 524 U.S. ___, 141 L.Ed.2d 451 [1998] [compare plurality, concurring, and dissenting opinions].)

California's focus on the regulators' objective good faith is thus wholly contrary to this Court's consistent teachings, and presents aggrieved landowners in that State with a Catch-22 conundrum – i.e., absent bad faith on the part of the government (say the California courts), there is no taking (*Landgate*, 17 Cal.4th at 1022); but when landowners seek to *offer evidence of* bad faith, they are told that they may not do so (*Landgate*, 17 Cal.4th at 1022).

IV

IT CANNOT BE CONSTITUTIONAL TO REQUIRE LANDOWNERS TO MAKE A HOBSON'S CHOICE OF SUCCUMBING TO THE WRONGLY ASSERTED REGULATORY POWER OF A GOVERNMENT AGENCY THAT HAS NO JURISDICTION OVER THEIR PROPERTY, OR LOSE THEIR ABILITY TO VINDICATE THEIR RIGHTS UNDER THE JUST COMPENSATION CLAUSE OF THE 5TH AMENDMENT

It is undisputed that the California Legislature exempted coastal properties like the one at bench from the Coastal Commission's regulatory grasp. Single family lots in areas already built up in that fashion are to be regulated by the local land use authorities, not the Commission. (Cal. Pub. Res. Code §§ 30610.1, 30610.2; App., pp. 73-76.) The regulatory jurisdiction shifted formally when the Buckleys obtained a

certificate of exemption from Los Angeles County on Oct. 24, 1989. (App., p. 64.)[29]

Notwithstanding the Buckleys' exemption, the Coastal Commission continued to interfere with their efforts to build even a single family home on their lot. Indeed, the Commission prevented the Buckleys from repairing a landslide on their lot, a pointless and arbitrary action that caused severe damage to the property to no rational purpose. On March 26, 1991, the Commission delivered a "stop work" order to the Buckleys and their contractor. In all capital letters, on the Commission's letterhead, it said at the top of the page, "STOP WORK" four times. The order identified the property by street address and said:

> "You are hereby notified to stop all unpermitted work.[30] No grading is permitted *on this property*. A Coastal Permit has not been issued for this project." (App., p. 67; emphasis added.)

The notice also threatened to impose fines for any work on the property, including a base fine of $10,000 plus additional fines of as much as $5,000 *per day*. Similar notices were delivered by the Commission on June 11, 1991 and Dec. 5, 1991. (App., pp. 68-72.) Confronted with the unmistakable presence of the County's certificate of exemption, the Commission ingenuously asserted that a *part* of the Buckleys' single lot was environmentally sensitive so the Commission had jurisdiction over that part. That ploy flew in the teeth of the statute, which exempted entire lots, and the County's

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[29] Apparently, the Commission has never liked this legislative restriction on its jurisdiction. In 1983, the Commission filed – and lost – a challenge to exemptions issued by the City of Los Angeles. (*California Coastal Commn. v. City of Los Angeles*, L.A. Superior Ct. case no. 430788 [1983].) Thus even though, as noted earlier, the Commission's state of mind is irrelevant, it is much more likely that its action was consciously (and stubbornly) undertaken, rather than being "mistaken," as gently characterized by the Court of Appeal. (App., p. 31.)

[30] The Buckleys *had* all the appropriate *County* development permits. This reference is to a *State* permit *that the Commission had no jurisdiction to issue, deny, or even consider.*

certificate, which also exempted the Buckleys' entire lot. (App., pp. 65-66.) Moreover, as the trial court found, the Commission never presented evidence to support its claim of environmental sensitivity (App., p. 41), thus rendering its position unsupportable and plainly in bad faith. Nonetheless, even after the trial court held that the Commission had no jurisdiction over the Buckleys' lot, the Commission remained defiant. In the trial court's words: "The Commission has represented to the Court, through its counsel, that it will continue to claim jurisdiction until all appeals are exhausted." (App., p. 50.)

But though without *jurisdiction*, the Commission was not without *power*. Its "stop work" orders were directed to the Buckleys' contractors as well as to them. As each was posted, the contractors immediately complied. After all, contractors do business pursuant to State licenses, and no single family home construction project can be worth risking either their licenses or the kind of ruinous fines the Commission threatened to impose. That same cloud of fiscal disaster hung over the Buckleys themselves.[31] Regardless of their firm belief in the correctness of the trial court's ruling, they had no guarantee that the Commission would not somehow convince a California appellate court to reverse it.[32] Recall that, in *Nollan*, the Commission persuaded the California courts that reconstruction of a beachfront cottege would create a "psychological barrier" which would justify what this Court

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[31] This is no hyperbole. See, e.g., *Whaler's Village Club v. California Coastal Commn.*, 173 Cal.App.3d 240 (1985), where the California courts held the Commission to be within its powers when it sought to confiscate beachfront homeowners' land *and to fine them* because they created emergency revetments (without Commission approval) in order to save their homes from being destroyed by unusually severe winter tides.

[32] In light of the history of California's attitude toward property owners described earlier, that concern was not unfounded. Beyond that, the Commission has for years had a record of reversing unfavorable trial court rulings that is magnitudes better than that of mere mortal litigants. (See the statistics reported in Berger, *You Can't Win Them All – Or Can You?* 54 Cal. State Bar J. 16 [Jan./Feb. 1979].)

termed "out and out . . . extortion" of their land. (*Nollan*, 483 U.S. at 837-838.)

And yet, the Court of Appeal held that there was no taking because the Buckleys could have developed the front portion of the lot and could have developed all of it once the trial court had ruled (App., p. 20).

What a Hobson's choice to put before these innocent citizens! Either concede regulatory power to an agency that had no jurisdiction and lose the use of at least half of your property, or lose the ability to seek constitutionally mandated compensation for the impact of the agency's actions. Actually, under this court-imposed scenario, the Buckleys would lose their constitutional rights either way for, in California, when landowners comply with an unconstitutional government demand under protest and then seek the adjudication of its illegality, they are told by the state courts that their compliance with the illegal demand is deemed to waive their rights. (*E.g., Pfeiffer v. City of La Mesa*, 69 Cal. App.3d 74 [1977].)

This California rule plainly defies the unconstitutional conditions doctrine; government cannot condition the exercise of constitutional rights. (*Perry v. Sindermann*, 408 U.S. 593 [1972].) In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), landowners asked the City of Klamath to vacate certain "paper streets" (i.e., streets that appeared as lines on an official map but that had never been built) across their land. The city agreed but, in exchange, demanded title to the owners' geothermal wells. There was no connection between the wells and the street vacation, and no question that the wells were substantially more valuable then the streets sought to be vacated. The landowners were simply convenient "fish in a barrel" from whom the city thought it could extort something to which it was not entitled. As the Court of Appeals saw it, the city's action was a demand that the landowners give up their 5th Amendment right to compensation for their property as a condition to obtaining street vacation. Holding the city's position constitutionally infirm, the court said:

> "the government may not impose a choice between the government benefit and the exercise of a constitutionally guaranteed right." (*Parks*, 716 F.2d at 650.)

In so holding, the court relied on *Perry*, where this Court held that a public employer may not condition employment on the employee's forsaking First Amendment rights. This Court likewise applied the *Perry* rule in *Dolan*, 512 U.S. at 385-386, to the property owner's claim that the city was forcing her to choose between obtaining a building permit and being compensated for property taken for municipal greenbelt/bikeway/flood channel purposes.

Here, the Court of Appeal conditioned the Buckleys' ability to seek compensation for a 5th Amendment violation on their agreeing to submit to the exercise of *power* – not lawful jurisdiction, but merely naked, *unlawful* power – by the Commission in a way that the same court had already held to be "void." (App., pp. 15, 20.)

In this context, it bears emphasis that the government is not merely another citizen. The Buckleys were faced with an opponent that demonstrated both the will and the ability to remain "in their face" for as long as it took to achieve its goal. The Commission repeatedly posted "stop work" orders that it had no authority to issue, and sent those orders to the Buckleys' State-licensed building contractors, threatening their livelihood via ruinous fines for continued work. Its lawyer (a Deputy Attorney General) wrote to them, repeating the financial threats. Even after losing at trial, it told the trial court that it would continue its claim of regulatory jurisdiction until it had run out of appeals, which is just what it did. And yet, in the teeth of that, the Court of Appeal faulted the Buckleys because they did not defy the Commission's stop work orders and build with this sword of Damocles hanging over them.

With respect, the Court of Appeal ignored reality. Or, perhaps, it merely illustrated the grim reality that property owners have to face in California courts. A more constitutionally sensitive view of similar facts was expressed by the Court of Appeals for the Federal Circuit. In *Yuba Goldfields,*

Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983), the United States asserted ownership of property containing precious metals. The U.S. Army Corps of Engineers wrote to the record owner of the mineral interest and ordered that further dredging or removal of material "is prohibited." As here and in *Landgate*, the government said it asserted its claim "only long enough to obtain a judicial determination." (*Id.* at 886.)

But, unlike the California courts, the Federal Circuit recognized the impact of such governmental conduct:

> "The trial court's characterization of the role of the United States as that of a private person is flawed by its disregard of the express notice, 'dredging is prohibited.' Private persons do not talk like that; governments do.
>
> * * *
>
> "[T]he United States is not a private party. It imposes penalties, criminal and civil, the threat of which lurks behind government statements like those here involved, regardless of what the government may have intended. The United States calls upon unlimited resources." (*Id.* at 889.)

The situation at bench is far more severe than in *Yuba Goldfields*. The threat of penalties did not "lurk" behind the scenes. It was right out front. Even though it lacked jurisdiction, in every "stop work" order and letter, the Commission threatened the Buckleys and their contractors with debilitating fines. (App., pp. 67-72.) As this Court put it in the classic opinion in *Ex Parte Young*, 209 U.S. 123, 146 (1908):

> "When the legislature, in an effort to prevent any inquiry of the validity of the particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

The reality facing Mr. and Mrs. Buckley was that their implacable foe was hovering over them, constantly threatening to bankrupt them and anyone who dared to work for them. They had no "choice" to build anything; their only "choice" was to surrender their constitutional rights to build on their land (see *Nollan*, 483 U.S. at 834, fn. 2), or to surrender their right to be compensated for the taking of their land (see *First English*, 482 U.S. at 322). To say that the court below was unrealistic when it so asserted in its Opinion (App., p. 20) would be to indulge in gross understatement. What the record shows is the Commission's wrongful exercise of raw governmental power that realistically prevented all use of the property. It was a constitutional outrage for California's appellate courts to apply their own insular brand of "law" to tell the Buckleys that their constitutional "rights" consisted of either knuckling under to the Commission's lawless demand or forfeiting their right to the protection of the 5th Amendment. This Court would not tolerate such parochial defiance of the supreme law of the land when other constitutional rights were threatened (e.g., *Cooper v. Aaron*, 358 U.S. 1), and no reason appears why defiance of the Just Compensation Clause should be tolerated here (compare *Dolan*, 512 U.S. at 392).

CONCLUSION

With the surfeit of land use litigation produced in California's courts and more than two decades of experience since this Court announced in *Agins* that government action denying economically viable use of land requires compensation, one thing is incontestible: *there is no reported California case in which a property owner has ever recovered compensation for a regulatory taking from a California state court* – in spite of the fact that California is the most populous, the most litigious, and probably the most highly regulated state in the Union, that has spawned more regulatory takings cases in this Court than all other American jurisdictions combined. The reason for that is now abundantly clear: that's the way the California Supreme Court wants it and, to that end, it has no

inhibition about frustrating and indeed defying this Court's 5th Amendment decisions.

That situation must change. Californians are entitled to better. The integrity of this Court's holdings is entitled to better. The Constitution is entitled to better. Mrs. Buckley prays that certiorari be granted, that California's rules be brought in line with this Court's settled jurisprudence, and that the compensatory judgment entered by the trial court be reinstated.

Respectfully submitted,

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**Counsel of Record*

APPENDIX A

[No. B081544. Second Dist., Div. Two. Dec. 1, 1998.]

PEGGY ANN BUCKLEY et al., Plaintiffs and Respondents, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant.

PEGGY ANN BUCKLEY et al., Cross-complainants and Respondents, v. CALIFORNIA COASTAL COMMISSION, Plaintiff, Cross-defendant and Appellant.

Alan V. Hager, Joseph Barbieri, Matthew Rodriguez and Terry T. Fujimoto, Deputy Attorneys General, for Defendant and Appellant and for Cross-defendant and Appellant.

Thomas M. Banks, Shapiro, Rosenfeld & Close, Eliot G. Disner and Elizabeth E. Webb for Plaintiffs and Respondents and for Cross-complainants and Respondents.

OPINION

NOTT, J. –

I.

The California Coastal Commission (Commission) appeals from a judgment awarding $2,187,331.76 in damages, attorney fees and costs to respondents Peggy Ann

and John Buckley for the taking of their property without compensation.[1]

We affirm the trial court's ruling that the Commission had no jurisdiction over the rear portion of the Buckleys' lot. However, the damage award is reversed because the evidence does not establish that the mistaken assertion of jurisdiction by the Commission amounts to a taking. (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006 [73 Cal.Rptr.2d 841, 953 P.2d 1188].) For the reasons stated below, we also reverse the award of attorney fees.

II. Facts and Procedural History

In January 1988, the Buckleys purchased an undeveloped lot in Malibu, which was at the time an unincorporated area of the County of Los Angeles (County). The Buckleys intended to build a single-family residence on the lot, which is located in an established single-family residential community. They were informed by their real estate broker that the lot was exempt from review or regulation by the Commission for construction of a single-family residence. The Buckleys paid $485,000 for the property, and they invested between $200,000 and $300,000 adding electricity, water, gas, a fence, a septic

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[1] According to a declaration filed in November 1996 by counsel for John Buckley, the Buckleys are married but have been separated and estranged for many months. Peggy Ann Buckley had her own attorney for the damages phase of the trial, and continues to be represented by separate counsel on appeal. We will refer to the Buckleys separately when their arguments on appeal require it.

system, and a foundation for the garage to the property; and having the building and grading plans developed.

The lot is 2.75 acres, rectangular in shape, running lengthwise from east to west. The front portion of the lot is a level area of about 1.15 acres that descends into a steep ravine in the westerly or rear portion, covering about 1.6 acres. Before it was purchased by the Buckleys, significant road grading had occurred on the west portion of the lot, including a road cut along the slope of the ravine's north side wall.

In November 1988, the Buckleys retained a soils engineering firm. The geological engineer, Dale Glenn, testified that she first visited the site in 1988 with the soils engineer, who "indicated that there were some stability problems with the canyon and that in order to accomplish development of the site, that it would be very likely that the canyon would have to be filled in and that we needed a study in that canyon." However, Glenn described the original grading plan, trial exhibit 30, as a plan for grading the front portion of the lot. In her direct testimony, she was asked whether, as of February 27, 1990, "would it have been possible for the Buckleys to develop their property by simply grading the portion of the property shown in exhibit 30 and constructing the residence that was permitted in 1989?" Glenn replied, "Yes."

Meanwhile, although they did not yet have grading plan approval, by August 15, 1989, the Buckleys had stockpiled fill dirt on the front portion of the lot. On that date, the Buckleys received a letter from the Commission stating that the property was located in the coastal zone, and that a coastal development permit was required for

any development. On August 25, in response to the Buckleys' answer to its earlier letter, the Commission agreed that the County had the authority to exempt from coastal development permits development projects involving new single-family homes.[2]

A subsequent letter from the Commission stated that because the rear portion of the lot was in an environmentally sensitive habitat area (ESHA), the rear portion was not part of the exemption. The Buckleys were informed that they could either seek a coastal development permit or submit to the Commission a valid exemption issued by the County. They were warned that if they chose the latter, they would not be allowed to develop the rear of the property where the ravine is located.

The Buckleys replied that they were not developing the rear portion of the lot and that if they decided to do so in the future, they would seek a coastal development permit.

The County issued the exemption on October 24, 1989. The Buckleys' plans for grading the front portion of the lot and building a residence of 15,000 square feet were approved by the County.

In the fall of 1989, the Buckleys decided to sell the lot rather than build on it. They were advised by real estate

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[2] The exemption is known as a "Calvo exclusion" after the former state assemblyman who sponsored the legislation permitting the exemption, which is codified at Public Resources Code sections 30610.1 and 30610.2.

All further statutory references are to the Public Resources Code unless otherwise stated.

brokers in the area that a dispute with the Commission would have a negative impact on the selling price. John Buckley testified that he was told that with a permit to build, the property was worth between $1.5 and $2 million.

The Buckleys' expert, Frederick Chin, a real estate consultant and appraiser, testified that the land value appreciated approximately 115 percent a year between January 1988 and May 1990; and that the lot was worth $1.3 million in May 1990.

A new grading plan, dated February 1990 and referred to as exhibit 31 at trial, was readied for submission to the County. It called for three building pads in the rear section of the lot: two pads in the ravine and one on the ridge. The pads were to be for a garden, a riding ring or tennis court, and a guest house. The plan was submitted to the County in April 1990, but not submitted to the Commission until October 1990.

Dale Glenn testified that the new grading plan would have stabilized the ravine. However, she admitted on cross-examination that the plan was designed to increase usable space. She said, "The canyon was unstable, it needed to be stabilized, that was going to create a great expense for the Buckleys and to offset some of that expense, we recommended that they do a grading solution that would gain saleable or some usable land on the property as opposed to some other method which we hadn't explored even at that time . . . for instance, soldier

piles would put a great expense on the site and produce nothing."[3]

In February 1991, the Commission's staff report recommended denial of the request because the development would be inconsistent with the ESHA policies of the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq. (Coastal Act)). Glenn testified that a few days after the rain in March 1991, just before the Commission's March 13 hearing on the permit application, she discovered a landslide condition on the lot. The Buckleys informed the commissioners that a landslide had developed in the ravine and that it threatened the adjacent properties. The Commission denied the application. The Buckleys did not appeal the Commission ruling.

Just after the Commission's denial, the County determined that the Commission had no jurisdiction over any portion of the lot. As testified to by Dale Glenn, the County approved the later grading plan, exhibit 31, on March 19, 1991. The Buckleys began grading the lot. The Commission sent a stop work order in March 1991 which stated: "RE: Grading in a canyon, outside the exclusion area with valid coastal development permit." The order notified the recipient "to stop all work. Any additional

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[3] Donald Kowalewsky, an engineering geologist called to testify for the Commission, explained that soldier piles are reinforced concrete caissons, two feet in diameter, with a steel reinforcement beam down the center. In this case, the piles could be placed in the ground near the top of the slope and extend to a depth of about 40 feet, which would prevent future deterioration of the slope from undermining the driveway or the rest of the improved properties to the south of the area of the landslide.

unpermitted work on this site will be considered . . . a violation of the Coastal Act." Shortly after that, Malibu became an incorporated city, and a grading and construction moratorium was imposed on all city properties.

At some point, the Buckleys decided to grade the rear portion of the lot based on the County approval they received. In June 1991, the Commission again hand delivered a stop work order. The order notified the Buckleys "to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project."

In August 1991, the Attorney General sent a letter to the attorney who represented the Buckleys at the Commission hearing. The letter stated that "the Commission denied their permit application to develop the rear portion of their lot. . . . Despite the denial and a stop work notice . . . the Buckleys have continued to perform grading and filling on the site in violation of the Coastal Act."

In November, after a County geologist observed an unstable natural slope on the rear of the lot and the County ordered the Buckleys to abate the landslide that was occurring there, they resumed grading. They also filed for an emergency permit with the Commission on the basis that there was a landslide condition that needed immediate attention. An engineer from the Commission and a geologist from the City inspected the lot and concluded that the landslide condition did not pose an imminent threat but was a normal consequence of the rains. The engineer and the geologist also concluded that the grading plan submitted by the Buckleys was not the

minimum necessary to mitigate the geological conditions. The Commission denied the emergency request on those grounds. The Buckleys continued grading from November 27, 1991, until the Commission issued the final stop-work order on December 5, 1991. It again stated that they had to "stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project."

The Buckleys filed this declaratory relief action in December 1991. The Commission subsequently filed an action for injunctive relief and civil penalties and fines. The Buckleys cross-complained in that case for declaratory relief and damages. The cases were consolidated, and the Buckleys' initial action was found to be the lead case. That matter was then severed from the rest of the action, and a court trial proceeded.

In the declaratory relief action, the court held that the Commission had no jurisdiction over the lot. The Buckleys' motion to sever that action from the cross-complaint was granted. The trial court entered a final judgment in the declaratory relief action, and the Commission filed a notice of appeal.

Subsequently, the Buckleys placed the lot on the market for a sale price of $1.4 million by order of the family law court.

Trial proceeded on the Buckleys' cross-complaint for damages. The trial court awarded $1,355,837 in damages for the permanent taking of their property, and $831,494.76 in attorney fees, appraiser fees and costs.

III. Contentions

We will address the following contentions raised by the Commission: (1) the Buckleys' complaint for declaratory relief challenging the Commission's jurisdiction over the property is barred by their failure to file a writ of mandate petition challenging the Commission's permit decision; (2) the trial court erroneously determined that the rear portion of the Buckleys' lot was exempt from the permit requirements of the Coastal Act; (3) the Buckleys' taking claim is barred by their failure to seek a writ of mandate challenging the Commission's jurisdiction; (4) even if the Commission wrongfully asserted jurisdiction over the property, its actions did not constitute a per se taking of the property; (5) section 30005 has no application to the issue of whether the Commission engaged in a taking; (6) the Buckleys are not entitled to attorney fees because there was no taking; and (7) the trial court was biased against the Commission. In light of our resolution of these issues, we need not discuss the Commission's argument that the trial court erroneously calculated the amount of damages.

IV. Discussion

A. *The Declaratory Relief Action Is Not Barred by the Failure to File a Writ Petition*

The Commission begins its argument with a citation to section 30801, which provides: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure, within 60 days after the decision or

action has become final." Asserting that the Buckleys' permit application was denied on March 15, 1991, and that they failed to file a writ petition challenging the assertion of jurisdiction by May 15, 1991, or anytime after, the Commission contends that the declaratory relief action collaterally attacking the Commission's jurisdiction is barred as a matter of law.

The trial court rejected the Commission's argument on the ground that the Commission did not have jurisdiction over the lot at the time the permit was denied; and, therefore, the Buckleys were not required to file a writ petition. Thus, the question before us is whether the statutes creating the exemption from coastal development permits allow a partial lot exemption, which is the basis of the Commission's position; or whether an exemption of any portion of a lot is an exemption of the whole lot, which is the heart of the Buckleys' argument.

1. *Statutory language*

" ' "[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import. . . . The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both

the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. . . . [Citations.]" ' [Citation.]" (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 186-187 [10 Cal.Rptr.2d 208, 832 P.2d 924].)

Section 30610.1 required, within 60 days of its effective date, January 1, 1980, the Commission to designate areas in the coastal zone where construction of a single-family residence on a vacant lot meeting certain criteria would not require a coastal development permit. "Areas shall be designated for the exclusion provided for in this section if construction of single-family residences within the area to be designated has no potential, either individually or cumulatively, for significant adverse impacts on . . . environmentally sensitive areas. . . . " (§ 30610.1, subd. (b).)

Subdivision (c) of section 30610.1 provides that no coastal development permit is required for the construction of a single-family residence on any vacant lot which meets certain criteria, including if it: "(2) Is a legal lot as of the effective date of this section and conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances."

Pursuant to section 30610.2, subdivision (a), a local government with jurisdiction over a lot issues a written certification that the lot is exempt from the coastal development permit requirement because the lot meets the criteria specified in subdivision (c) of section 30610.1.

According to the analysis of the proposed legislation by the Assembly Committee on Resources, Land Use, and

Energy, the Coastal Act required a permit for construction of any structure in the coastal zone. The requirement was "criticized as overly-stringent when applied to the construction of single-family residences in coastal areas which are already substantially developed for residential purposes." Pursuant to the proposed new sections, in unincorporated areas such as Malibu at that time, once the Commission designated specific zones, "all lots within such areas or zones would be exempt from the permit requirement for single-family residences."

The purpose of the legislation was to allow owners of lots in designated areas to build single-family residences without having to obtain a coastal development permit from the Commission. Sections 30610.1 and 30610.2 had the effect of eliminating the Commission's participation in the approval process for construction of single-family residences within the designated areas.

There is no provision that allows the Commission to designate a portion of a lot as being within sections 30610.1 and 30610.2. Both statutes use the term "a vacant lot." Once the Commission determined that a lot was within the single-family residence construction area, nothing in the statute permitted the Commission to retain jurisdiction over the decision to develop any part of that lot. If the Commission wanted to retain control over whether to allow improvements in the southwest corner of the Buckley lot, it had no alternative but to place the entire lot outside the area designated for single-family residence construction. By placing the lot within that area, the Commission forfeited its control and its discretion to approve or disapprove of construction on that lot.

To hold otherwise would not only add provisions to the statutes that were not included by the Legislature, it would also inhibit the legislative purpose of the statute. If a portion of a lot placed within the single-family residence construction area is subjected to the coastal development permit process, the owners must go through the Commission to improve their property. The very purpose of the statutes at issue here was to avoid that. We therefore hold that when the Commission, acting pursuant to section 30610.1, placed any portion of a lot within the single-family residence construction area, it placed the entire lot within that area. By placing a lot within the single-family residence construction area, the Commission relinquished jurisdiction over development decisions regarding the entire lot thereby.

2. *The Buckleys were not required to file a writ petition*

" '[A] matter within the commission's jurisdiction' " is any "quasi-judicial matter requiring commission action. . . . " (§ 30321.) Because the Commission had no role in the construction permit process regarding the Buckley lot, it follows that the Commission has no jurisdiction over the Buckley lot.

As stated in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 [109 P.2d 942, 132 A.L.R. 715], lack of jurisdiction is "an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." That is an apt description of the relationship between the Commission and the Buckleys' single-family residence construction on the lot.

Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. (*Summers v. Superior Court* (1959) 53 Cal.2d 295, 298 [1 Cal.Rptr. 324, 347 P.2d 668]; *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1723 [1 Cal.Rptr.2d 570]; *Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 333 [269 Cal.Rptr. 426].) Therefore, the fact that the Buckleys filed an application for a coastal development permit and the Commission denied the application did not confer on the Commission jurisdiction over the improvement of the lot. Because the Commission had no authority to deny the permit, the Buckleys were not required to seek judicial review of the denial. We do not disagree with any of the authorities cited by the Commission for the proposition that failure to obtain judicial review of a determination by an administrative agency by a timely petition for writ of administrative mandate renders the administrative action immune from collateral attack. (See, e.g., *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448 [31 Cal.Rptr.2d 559]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 602 [11 Cal.Rptr.2d 824]; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1498 [258 Cal.Rptr. 567].) We simply hold that the cases do not apply here.[4]

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[4] The Commission also cites a series of cases, *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13-14 [32 Cal.Rptr.2d 244, 876 P.2d 1043], among them, to argue that res judicata bars the Buckleys' declaratory relief action. We do not agree that Hensler would support such a statement, but we need not discuss it or any of the other cases cited to support this contention. Our conclusion that the Commission had no jurisdiction over any improvements on the lot completely resolves in favor of the Buckleys the issue of whether the declaratory relief action was barred.

The rule of exhaustion of administrative remedies does not apply where the subject matter lies outside the administrative agency's jurisdiction. (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827 [17 Cal.Rptr.2d 323]; *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1808 [41 Cal.Rptr.2d 123].) The Commission had no power to deny the Buckleys permission to improve any portion of their lot. Because it lacked power to make any determination, the denial of a permit to the Buckleys was a void act that could be set aside at any time. (See *Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 493 [165 Cal.Rptr. 825, 612 P.2d 915].)

B. *The Takings Claim Is Not Barred by the Failure to File a Writ Petition*

The Commission next argues that their failure to challenge the Commission's permit decision bars the Buckleys from claiming that the Commission's assertion of permit jurisdiction resulted in a taking of their property. The Commission cites the same authorities relied on in the preceding contention. This argument, like the earlier one, is based on the premise that the Commission had jurisdiction. Our conclusion that the Commission did not have jurisdiction when it denied the permit, and that the matter falls within an exception to the doctrine of exhaustion of administrative remedies, disposes of this issue as well.

C. *The Trial Court Erred in Finding That the Commission's Assertion of Jurisdiction Over the Buckley Lot Was a Taking*

After ruling that the Commission's prohibition against grading did not advance a legitimate state interest and denied the Buckleys any economically viable use of the lot, the trial court found that the Commission's assertion of jurisdiction over the development of the lot was a per se permanent regulatory taking of the Buckleys' property. The Commission is correct in its contention that the ruling by the trial court was erroneous, because the ruling is not supported by substantial evidence.

1. *The substantial evidence test*

Review of condemnation proceedings tried before the court requires the appellate court to determine whether there is any substantial evidence to support the findings. (*City of Commerce v. National Starch & Chemical Corp.* (1981) 118 Cal.App.3d 1, 18 [173 Cal.Rptr. 176].) The substantial evidence rule applies as well on review from inverse condemnation proceedings. (See *Patrick Media Group, Inc. v. California Coastal Com., supra*, 9 Cal.App.4th 592, 605 [appellate court bound by implied finding of fact supported by substantial evidence].)

Substantial evidence is not any evidence, but substantial proof of the essentials which the law requires in a given case. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [51 Cal.Rptr.2d 907].) Substantial evidence has ponderable legal significance, is reasonable, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d

191].) We focus on quality, not quantity, because very little solid evidence might be substantial, while a host of extremely weak evidence might be insubstantial. (*Roddenberry v. Roddenberry, supra,* at p. 651.) Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. (*Ibid.*) The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. (*Kuhn v. Department of General Services, supra,* at p. 1633.)

2. *The takings law*

Governments are prohibited from taking private property for public use without compensation. (U.S. Const., 5th and 14th Amends; Cal. Const., art. I, § 19.) To obtain compensation, the property owner may bring an action for inverse condemnation. (*United States v. Clarke* (1980) 445 U.S. 253, 257 [100 S.Ct. 1127, 1130, 63 L.Ed.2d 373] [inverse condemnation is an action to recover compensation for taking of property by means other than condemnation proceedings].) In an inverse condemnation action, the property owner has the burden of alleging and proving the owner's property right and its infringement. (*Gilbert v. State of California* (1990) 218 Cal.App.3d 234, 249-250 [266 Cal.Rptr. 891]; *People ex rel. Dept. Pub. Wks. v. Romano* (1971) 18 Cal.App.3d 63, 72, fn. 4 [94 Cal.Rptr. 839].)

The mere assertion of regulatory jurisdiction by a governmental body does not constitute a taking. (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121,

126-127 [106 S.Ct. 455, 459, 88 L.Ed.2d 419].) The requirement that a person obtain a permit before engaging in a certain use of the property does not itself take the property; the very existence of a permit system implies that permission may be granted to allow the owner to use the property as desired. Even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred. (*Ibid.*; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 385 [114 S.Ct. 2309, 2316-2317, 129 L.Ed.2d 304] [land use regulation does not effect a taking if it substantially advances legitimate state interests or does not deny owner economically viable use of the land]; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015-1016 [112 S.Ct. 2886, 2893, 120 L.Ed.2d 798] [Fifth Amendment violated when land use regulation denies owner economically viable use of land]; *Agins v. Tiburon* (1980) 447 U.S. 255, 260-262 [100 S.Ct. 2138, 2141-2142, 65 L.Ed.2d 106].)

For example, in *Lucas v. South Carolina Coastal Council*, a statute entitled the "Beachfront Management Act," enacted after the property owner purchased two residential beach front lots, barred the owner from building any permanent habitable structures. The Supreme Court held that "[w]here the State seeks to sustain regulation that deprives the land of all economically beneficial use" (505 U.S. 1027 [112 S.Ct. at p. 2899]), the state must compensate the owner for taking the property. However, as noted by our Supreme Court in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774 [66 Cal.Rptr.2d 672, 941 P.2d 851], a regulation may effect a taking even if it

leaves the owner some economically beneficial use of the property. Kavanau cites to footnote 8 in *Lucas v. South Carolina Coastal Council,* wherein the United States Supreme Court left open the possibility of a taking where the deprivation caused by a regulation "is one step short of complete." (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at p. 1019, fn. 8 [112 S.Ct. at p. 2895.)

Whether the owner has been denied substantially all economically viable use of the property is a factual inquiry that requires the analysis of such factors as the economic impact of the regulation, interference with the landowner's reasonable, investment-backed expectations and the character of the government action. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 175 [100 S.Ct. 383, 390, 62 L.Ed.2d 332].) The basis of the inquiry is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion. (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 497 [107 S.Ct. 1232, 1248, 94 L.Ed.2d 472].)

Temporary takings which deny a landowner all use of property are not different in kind from permanent takings, for which compensation is clearly required. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318 [107 S.Ct. 2378, 2387, 96 L.Ed.2d 250].) The *First Lutheran* court repeatedly used the term "all uses" to describe a temporary taking. Later United States Supreme Court permanent regulatory takings cases, such as those cited above, have employed expressions more favorable to the showing that must be made to establish a taking, such as " 'economically viable use of [the] land' " (*Dolan v. City of Tigard, supra,* 512 U.S. at p. 385 [114 S.Ct. at p. 2316]) and "all economically beneficial or productive use

of land" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at pp. 1015-1016 [112 S.Ct. at p. 2893]).

3. *The application of the substantial evidence rule and the law of takings to this case*

The trial court's determination that there was a permanent taking of the Buckleys' property was incorrect. After the trial court ruled that the Commission had no jurisdiction over the lot, the Commission's stop work orders no longer had any effect. Any taking that might have occurred was ended by that ruling. There is no basis in the facts, in the law, or in logic that would support the view that a permanent taking occurred in this case. We turn to the question of whether there was a temporary taking of the Buckley property.

The evidence established that until the County approved exhibit 31 after the landslide formed in March 1991, Buckleys had valid building and grading permits for the front portion of the lot. Pursuant to the County permits, the Buckleys or a subsequent owner were entitled to proceed with the construction of the 15,000-square-foot house that the Buckleys' plans called for. The Commission asserted jurisdiction only over the rear portion of the property, where the ravine is located. The Commission acknowledged that the front portion of the lot was subject to County jurisdiction pursuant to the Calvo exclusion, a point not in dispute after the exemption was issued by the County in October 1989. Indeed, the initial grading permit the Buckleys sought from the Commission concerned only the rear portion of the lot. The Buckleys, however, chose not to grade and chose to

build on only the front portion of the lot. Dale Glenn testified that the later grading and building plan, exhibit 31, was developed in part because the ravine had to be stabilized. However, the County had already approved the Buckleys' plan to build a 15,000-square-foot house on the property without requiring any grading in the ravine area. The Buckleys could have built or sold the property before submitting exhibit 31 to the County.

Subsequently, exhibit 31 was approved by the County. From this the Buckleys argue that the earlier grading and building plan, exhibit 30, was superseded and, because of the Commission's refusal to allow them to grade the rear of the lot they were not entitled to build at all after March 1991. However, the Buckleys did not establish that the County would not have been willing to allow them to execute the earlier approved plan, exhibit 30, after the Commission did not approve the application to grade the rear of the lot pursuant to exhibit 31.

Because the Buckleys could have developed the front portion of the lot, or sold the lot with the County permits in place, the grading restriction imposed by the Commission, though erroneous, did not prevent all economically viable or productive use of the lot even before the Buckleys obtained a successful result in the declaratory relief portion of the trial. Therefore, the record does not support a finding that there was a temporary taking in this case.

a. *The impact of the landslide on the taking analysis*

To support the trial court's ruling, Peggy Ann and John Buckley both assert that after the landslide developed in the ravine, the Commission's prohibition against grading the rear of the lot effected a taking of the entire lot because, at that point, the front portion of the property could not have been developed without grading the entire property. The evidence supports the position that the landslide changed the situation on the rear portion of the lot and made grading a necessity. The evidence does not support the argument that, as a result, a taking occurred.

Peggy Ann states that after the landslide, "any development of the Lot would require the landslide to be mitigated." Both respondents rely on the testimony of Dale Glenn, who stated that after the landslide she could not provide to the County a report required by the Los Angeles County Building Code, stating that no conditions on the property would adversely affect the adjoining properties. However, other portions of Ms. Glenn's testimony bring into question the Buckleys' premises: first that the grading plan they submitted to the Commission was the only plan that would have remedied the landslide, and second that the Commission's failure to approve that grading plan the Buckleys submitted caused them to be unable to build at all and thus effected a taking.

Glenn testified that exhibit 31 was designed to create more usable space for the Buckleys, to offset some of their

expense. However, she did not testify that after the Commission's rejection of the exhibit 31 grading plan she attempted to modify exhibit 31 in any way in order to obtain approval for grading the ravine area with perhaps only one or two pads.

The Glenn testimony undercuts the Buckleys' position, as does the testimony of the Commission's engineering geologist, Donald Kowalewsky. Kowalewsky testified that the rear portion of the lot could have been graded in a way that would have stabilized the ravine with substantially less grading than the Buckley's proposed grading plan. He recommended removing all the landslide material and additional earth to a depth of 12 feet, and replacing it with compacted fill. Drains would be placed within the fill to prevent the groundwater from building up behind the fill. The fill would be placed within a reinforcing geofabric that would stabilize the fill and prevent it from undergoing superficial instability such as the slide currently taking place on the property.[5] According to Kowalewsky, when finished, the slope would be landscaped to have a natural look. He stated that this proposal would require "substantially less grading" than the Buckleys' plan.

In fact, the Buckleys did not attempt to work with the Commission to develop a plan that would require less

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[5] The geofabric was described as "a webbed net of a specialized plastic material that does not deteriorate. . . . It is typically placed about two feet apart, vertically, and it provides additional strength to the soil such that the soils will not sheer or break across or through this fabric material."

grading of the ravine. The Commission's permit application reviewer, Barbara Carey, testified that the Buckleys' permit denial was not a denial of all development. The Buckleys had the option of submitting a different grading plan. At that point, the court commented that the Buckleys "did not want to." But, as noted by the Commission's counsel, the Buckleys had a duty to mitigate their damages. Carey stated that the Buckleys never applied for a grading permit with a plan for less development.

Carey also testified that, as a permit application reviewer, "something like" Kowalewsky's suggestion that the failed earth material be removed and replaced with a compact fill, reinforced by geofabric and subdrains "would more likely be recommended for approval."[6] She was also asked about Kowalewsky's idea that a retaining structure such as soldier piles be placed along the edge of the driveway. Again she stated that such a plan would be more likely to be recommended for approval, and she testified that it would be less intrusive to the environmentally-sensitive habitat area.

Therefore, the evidence at trial did not support the Buckleys' position. The grading plan the Buckleys wanted was not necessarily the only one that would accomplish the goal of stabilizing the ravine. The Commission's denial was not unreasonable, and no evidence

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[6] In her petition for rehearing, Peggy Ann argues that Kowalewsky's testimony was unreliable in part because Dale Glenn had testified that the County does not allow geofabric. At that time, however, it was the Commission, not the County, that the Buckleys had to work with in order to develop an approved grading plan for the rear of the lot.

indicated that the Commission would not entertain a different grading approach. The denial of the grading plan submitted to stabilize the landslide was not a taking.

b. *The effect of section 30005*

Both Peggy Ann and John contend that the Commission interfered with their efforts to abate the landslide, in violation of section 30005, which provides that no provision of the Coastal Act "is a limitation . . . [¶] . . . [¶] (b) On the power of any city or county . . . to declare, prohibit, and abate nuisances." Even if true, such violation of section 30005 could not have caused a taking, in light of our conclusion that the evidence does not show that the Commission was against any grading of the ravine whatsoever. The record shows that the Commission denied the first and only grading plan submitted by the Buckleys, one that, according to the testimony of the Buckleys' geological engineer, was designed to gain more usable land while stabilizing the ravine.

c. *The Buckleys' interpretation of the stop work orders was not reasonable*

Peggy Ann also argues that the Commission's stop work orders were not limited to the rear areas of the lot, but related to the entire lot. She cites in support the testimony of the Commission's enforcement officer, Pam Emerson, who admitted that the December 1991 stop work order did not state that it was limited to the ESHA area. However, Peggy Ann ignores other testimony on this point.

The March 1991 stop work order stated: "RE: Grading in a canyon, outside the exclusion area with valid coastal development permit." The order notified the recipient "to stop all work. Any additional unpermitted work on this site will be considered . . . a violation of the Coastal Act."

The June 1991 stop work order notified the Buckleys "to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project."

The August 1991 letter from the Office of the Attorney General to the attorney for the Buckleys at the Commission hearing stated that "the Commission denied their permit application to develop the rear portion of their lot. . . . Despite the denial and a stop work notice . . . the Buckleys have continued to perform grading and filling on the site in violation of the Coastal Act."

Finally, the December 1991 stop work order again stated that the Buckleys had to "stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project."

Although the June and December stop work orders do not refer specifically to the rear portion of the lot, the March stop work order did, as did the letter from the Attorney General's Office. Pam Emerson, the enforcement officer for the Commission, testified that the letters did not refer to the rear of the lot because the Commission knew that the Buckleys had a Calvo exclusion for the front portion of the lot.

John admitted that the Commission never stated that it was asserting jurisdiction over the entire lot. Peggy Ann testified that after the August 1991 letter, she believed that she had the right to develop the property, but she believed the Commission would never leave them alone. She admitted, however, that she did not contact the Commission to determine whether the stop work orders referred to the whole lot. In fact, no one contacted the Commission on behalf of the Buckleys to clarify this point – not the lawyer they hired to appear before the Commission, not the facilitator they hired to move their permit through the Commission, not the lawyers they hired to pursue this litigation. Moreover, John testified that they put in electricity, water, gas, a fence, a septic system and a foundation for the garage on the exempt portion of the lot, but there was no evidence that the Commission interfered with any of that work. Therefore, we conclude that there was no evidentiary basis for the Buckleys' position that the Commission was prohibiting them from doing any work on the lot.

d. *The Buckleys did not establish that the permits are no longer valid*

Peggy Ann contends that if the Buckleys were required to modify the approved County plans to accommodate a different grading plan after the change of jurisdiction from the County to the City of Malibu, they would probably have to start the permit process over again. However, the Buckleys did not establish whether the City of Malibu would in fact require them to start the process again.

The Buckleys' appraiser, Mr. Chin, testified that he did not check with the City or the County to determine whether the permits issued by the County were still valid at the time of trial. The Buckleys called Grant Lawseth, who is with the County Building and Safety Division, who testified that the City of Malibu was honoring building permits issued by the County, though he was not sure about grading permits. On cross-examination, he testified that he did not know whether the Buckleys tried to determine whether their County permits are still valid. In fact, the court itself noted that there was no evidence on the question of whether the City of Malibu would honor the permits issued to the Buckleys. It was, however, the Buckleys' burden to establish that, and there was no evidence that they could not still build according to the County-approved plans.

e. *The Landgate Decision*

Finally, the recent decision of our Supreme Court in *Landgate, Inc. v. California Coastal Com., supra,* 17 Cal.4th 1006 precludes any monetary recovery by the Buckleys. Boiled down to its essence, *Landgate* held that, under the facts presented, an incorrect decision of the Commission in asserting jurisdiction over property did not constitute a temporary taking.

(1) *Facts*

Landgate is a developer which purchased land in Malibu that was subject to the Coastal Act, and thus the concurrent jurisdiction of the County and the Commission.

Landgate proposed to grade its north lot and build a large residence, which would include a guest house and a swimming pool. The County gave its blessing to the project.

Landgate applied to the commission for a permit, which was denied on three grounds: (a) the visual impact of the project on the environment, (b) excessive amounts of grading, and (c) an illegal lot line.

Of the three reasons, the lot line adjustment was the sticking point. *Landgate* had previously received County permission to revise the lot lines of property it owned because of a road which had been constructed in the area. The Commission regarded the County's action as illegal. The County believed that the Commission had waived its right to object by acquiescing in the construction of the road.

Subsequently, *Landgate* revised its project to alleviate any problems regarding visibility and grading. The Commission denied the project once again, with the lot line adjustment still being the major problem.

Landgate then filed two actions. The first was a writ of mandate based on the argument that the Commission had no jurisdiction over the lot line adjustment. The second was a complaint for damages for a "taking" without just compensation.

The trial court granted the writ of mandate, holding that the lot line adjustment was not within the Commission's purview. The trial court ordered the Commission to rehear the application on its merits. The court of appeal affirmed, holding that the Government Code did not

authorize the Commission to invalidate a legally recorded lot line adjustment to which the Commission had given tacit approval.

In February of 1993, *Landgate*'s project (modified again) was approved, subject to conditions relating to height limits, drainage, color and landscaping, to which *Landgate* did not object.

Both sides then filed for summary adjudication on *Landgate*'s "takings" complaint. The trial court found that the Commission's erroneous assertion of jurisdiction prevented the use of the property from February of 1991 until February of 1993 and awarded damages of $155,657. The Commission appealed. *Landgate* also appealed that the damages were too low.

(2) *The decision*

The Supreme Court granted review to decide a single issue: Whether the Commission's mistaken assertion of jurisdiction led to a temporary taking.

For better or for worse, in a four-to-three decision, the majority held that a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. (*Landgate, Inc. v. California Coastal Com., supra,* 17 Cal.4th 1006, 1022.)[7]

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[7] Justice Chin and Justice Rogers each wrote separate dissents, and each was joined by Justice Baxter. The thrust of

The Supreme Court stated that a mere assertion of regulatory jurisdiction did not equate to a regulatory taking. (17 Cal.4th at p. 1027.) "[W]hen the Commission determined that *Landgate*'s lot was not legal, it could legitimately litigate the lot line question without offending the takings clause. The Commission could not be said to have reached a final and authoritative determination of the development on *Landgate*'s lot until after the dispute about the legality of the lot had been resolved." (*Id.*, at p. 1029.)

Further, the Supreme Court said that the reality of the application process is that, on occasion, disputes will lead to judicial proceedings. However, so long as such proceedings are not brought on by the arbitrary or capricious acts of the governmental agency, the delay in approval occasioned by judicial proceedings is simply an unfortunate part of the normal process. (17 Cal.4th at pp. 1029-1032.)

(3) *Application of Landgate*

As in *Landgate*, the present case likewise involves the mistaken assertion of jurisdiction by the Commission. In the previous part of this opinion at part A.1., we have held, in a question of first impression, that the Commission could not exempt a lot from having to obtain a

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each dissent is that when a regulatory agency prohibits all use of a particular property and the owner is forced to sue the agency to achieve the correct result, a compensable taking has occurred. Further, litigation over land use is not a "normal delay."

coastal development permit and yet still retain jurisdiction over another part of that same lot. Under the *Landgate* test, no taking is involved so long as there is an objective and sufficient connection "between the land use regulation in question and a legitimate governmental purpose, so that the former may be said to substantially advance the latter. [Citations.]" (17 Cal.4th at p. 1022.)

Similar to *Landgate*, the present matter essentially involved a clash of wills between the County and the Commission and, to a certain extent, the Buckleys. However, the record does not support a finding that there was anything improper about the Commission's position that the rear portion of the lot was indeed an environmentally sensitive habitat area. Nor is there any support for the proposition the Commission's motives were in bad faith. In any event, as stated in *Landgate*, we are not to look at the subjective motive of the government agency but instead to determine whether objective evidence supports the connection between the regulation and a legitimate purpose. (17 Cal.4th at p. 1022.) As previously stated, the evidence shows that there was indeed a connection between the land use regulation and a legitimate governmental purpose in attempting to control the rear portion of the Buckleys' property.

f. *Conclusion as to taking*

We conclude that the Buckleys did not establish that the assertion of jurisdiction and denial of the grading permit was either a permanent or a temporary taking. There was, therefore, no basis for the trial court's award of damages, which is reversed.

4. *The Buckleys are not entitled to attorney fees*

Code of Civil Procedure section 1036 provides: "In any inverse condemnation proceeding the court rendering judgment for the plaintiff by awarding compensation . . . shall determine and award or allow to the plaintiff, as a part of that judgment . . . a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

Inasmuch as we have reversed the compensation award because the evidence did not support a taking, we must reverse as well the $831,494.76 in attorney fees, appraisal fees and costs awarded pursuant to section 1036 of the Code of Civil Procedure. (*City of Los Angeles v. Property Owners* (1982) 138 Cal.App.3d 114, 121 [187 Cal.Rptr. 667], review den. and cert. den.) Under the plain language of the statute, since the Buckleys will not receive a compensation award for inverse condemnation, they are not entitled to attorney fees.

5. *The trial court was not biased against the Commission*

The trial court several times used phrases such as "government tyranny" and "tyrannical behavior" when referring to the acts of the Commission. Despite these statements, our review of the massive record in this case

does not indicate that the court was biased against the Commission to the extent that reversal is required on that ground. (Contra, *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237 [42 Cal.Rptr.2d 440].)

Disposition

The judgment in the declaratory relief action (No. BC044916) is affirmed. The judgment in the cross-complaint for damages (No. SC015614) and the award of attorney fees and costs are reversed. Each party is to bear its own costs on appeal.

Boren, P.J., and Zebrowski, J., concurred.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

December 28, 1998

BUCKLEY, PEGGY ANN

Plaintiff-Respondent

v.

CALIFORNIA COASTAL
COMMISSION

Defendant-Appellant

B081544
Los Angeles County No. BC044916

THE COURT:

Petition[s] for rehearing [are] denied.

cc: All Counsel
File

APPENDIX C

Second Appellate District, Division Two, No. B081544
S066022

IN THE SUPREME COURT OF CALIFORNIA

PEGGY ANN BUCKLEY Et Al., Respondents

v.

CALIFORNIA COASTAL COMMISSION, Appellant

(Filed Feb. 24, 1999)

Respondents' petition for review DENIED.

Baxter, J., Chin, J., and Brown, J., are of the opinion the petition should be granted.

/s/ GEORGE
Chief Justice

APPENDIX D

Second Appellate District, Division Two No. B081544
S066022

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA COASTAL COMMISSION, Appellant

v.

PEGGY ANN BUCKLEY et al., Respondents

(Filed Jul. 8, 1998)

The above-entitled review is hereby transferred to the Court of Appeal, Second Appellate District, Division Two, with directions to vacate its decision and to reconsider the cause in light of *Landgate, Inc.* v. *California Coastal Com.* (1998) 17 Cal.4th 1006.

/s/ George
Chief Justice

/s/ Mosk
Associate Justice

/s/ Kennard
Associate Justice

/s/ Werdegar
Associate Justice

/s/ Chin
Associate Justice

/s/ Brown
Associate Justice

/s/ _____
Associate Justice

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEGGY ANN BUCKLEY and JOHN W. BUCKLEY, Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Defendants.	CASE NO. BC044916 [ ] STATEMENT OF DECISION [Cal. Rules of Ct., Rule 232(c)] (Filed Nov. 18, 1993)

Trial pursuant to this Court's bifurcation order of April 5, 1993 came on regularly for hearing, the Honorable William Huss, Judge presiding, on August 23, 1993 on the following issues:

> (1) Whether or not the entire lot owned by plaintiffs Peggy Ann Buckley and John W. Buckley, located at 6815 Dume Drive Malibu, California ("the Lot") is exempt from Coastal Development Permit requirements; and
>
> (2) Whether or not the California Coastal Commission ("the Commission") may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County of Los Angeles ("the County") with respect to the Lot.

Appearing for plaintiffs Peggy Ann Buckley and John W. Buckley were Eliot G. Disner, Esq. and Beverly Tillett Pine, Esq. Appearing for defendant California Coastal

Commission was Terry Fujimoto, Esq. Appearing for defendant the County of Los Angeles was Paul I. Yoshinaga, Esq.

Documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The Court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

1. With regard to the issue of whether or not the Lot in its entirety is exempt from Coastal Development Permit requirements, the Court's decision is that the entire Lot is exempt from the Coastal Development Permit requirements of the Coastal Act.

a. The Court has based its decision on the following facts:

1. In January, 1988, the Buckleys purchased the Lot which consisted of a vacant residential lot on which they planned to build a single-family residence (Buckley decl. ¶ 3).

2. The Lot is located in a developed single-family residential community (Supp. Buckley decl. ¶ 2).

[Text Deleted In Original]

4. On October 24, 1989, the County certified that "the [L]ot and the proposed single-family residence meets the requirements of Section 30610.1(c) of the Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act" (Plaintiffs' Ex. 514).

5. The County timely sent a copy of the Certificate of Exemption to the Commission (Admitted in Commission's Answer, ¶ 10), which went unchallenged by the Commission (undisputed).

6. Between October, 1989 and March, 1991, the County then issued grading and building permits calling for the grading and construction of a single-family residence on the Lot (Plaintiffs' Ex. 522).

7. On October 5, 1990, the Buckleys applied to the Commission for a coastal development permit which was denied by the Commission on March 15, 1991. The Buckleys did not appeal the Commission's denial by way of petition for writ of mandate (undisputed).

8. In adopting the Calvo exclusion amendments to the Coastal Act (PRC §§ 30610.1 and 30610.2), the Assembly Committee on Resources, Land Use and Energy noted that "[w]here the residential character of an area has already been established, it is asserted there is little public benefit to be achieved by requiring lot owners to obtain coastal permits before building single family homes." Legislative Intent Service, Ex. 3a, pp. 1-2 (Plaintiffs' Ex. 1 to August 19, 1993 Decl. of Burtram Johnson).

b. The legal basis for the Court's decision is:

1. No coastal development permit is required for the construction of a single-family residence on any existing vacant lot meeting specified area and lot criteria (PRC § 30610.1(a)).

2. The County had determined that the Lot met the statutory requirements for exemption from coastal development permit requirements pursuant to PRC

§ 30610.1(c) and issued a Certificate of Exemption from the coastal development permit requirements of the Coastal Act for said Lot in accordance with PRC § 30610.2. The commission did not challenge the County-issued Certificate of Exemption pursuant to CCP 1085 (undisputed).

3. The Commission cannot assert jurisdiction to the rear portion of the Lot based upon Map 96 of the Calvo AB 643 Final Adopted Maps (Plaintiffs' Ex. 504) because the Minutes of the Coastal Commission Meeting for January 22-24, 1980 (Commission's Ex. 2 to the Decl. of Priscilla Goehler) approved and adopted only the cross-hatched areas shown on the Calvo AB 643 Final adopted Maps pursuant to PRC § 30610.1. The portion of the Lot over which the Commission purports to assert jurisdiction here is not within such cross-hatched areas and was not specifically referred to in said minutes.

4. As to the portion of the Lot over which the Commission purports to assert jurisdiction (the rear portion of the Lot), the evidence fails to support the Commission's claim that it falls within an environmentally sensitive area as defined by PRC § 30107.5 or that designation of the rear portion of the Lot as such was officially approved and adopted by the Commission.

5. The evidence also fails to support the Commission's claims that the rear portion of the Lot falls within a Sensitive Coastal Resource Area as defined by PRC § 30116, or that the Commission recommended to the Legislature that the area be designated as such, or that the Legislature so designated the area as such by

statute, pursuant to PRC § 30502 in accordance with PRC § 30502.5 (undisputed).

6. The Commission's *res judicata* defense, based upon *California Coastal Commission v. Superior Court (Ham)* (1989) 210 Cal. App. 3d 1488, is insufficient because the Commission had no valid claim to subject matter jurisdiction over the Lot at the time it denied plaintiffs' application for a coastal development permit. *Id.* at 1501. The Certificate of Exemption applied to the entire Lot and therefore there was no administrative remedy plaintiffs had to pursue because the Commission exceeded its authority obviating the need for any further administrative remedy.

2. With regard to the issue of whether or not the Commission may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County with respect to the Lot, the Court's decision is that the Commission has no authority to limit or interfere in any way with the power of defendant County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no effect.

a. The Court based its decision on the following facts:

1. On March 26, 1991, the Commission hand delivered a stop work order referenced "Violation File Number: V-5-MAL-91-025" to plaintiffs notifying them that no grading would be permitted on the property, that a Coastal Permit had not been issued for the project and

that, any additional unpermitted work on the site would be considered a knowing and intentional violation of the Coastal Act which would subject plaintiffs to heavy monetary fines and penalties (Plaintiffs' Ex. 517).

2. On June 11, 1991, the Commission hand delivered a second stop work notice with respect to the Lot (Plaintiffs' Ex. 518).

3. On November 12, 1991, the Department of Public Works for the County ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition on the Lot identified in the geotechnical reports reviewed by the County (Plaintiffs' Ex. 524).

4. On December 5, 1991, the Commission hand delivered a third stop work notice with respect to the entire Lot (Plaintiffs' Ex. 519).

5. On March 6, 1992, the Department of Public Works for the County of Los Angeles again ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition which had developed on the Lot (Plaintiffs' Ex. 531).

b. The legal basis for the Court's decision is:

1. The Commission has no authority to limit in any way the power of the County to declare, prohibit and abate nuisances (PRC § 30005), including the issuance of any stop work orders.

2. The Commission cannot legally claim jurisdiction over any portion of the Lot (paragraphs 1 b. 1-6 are incorporated herein by reference).

Judgment is hereby ordered to be entered as follows:

1. The Lot in its entirety is exempt from the Coastal Development Permit requirements of the Coastal Act, PRC § 30000 *et seq.*

2. The Commission has no authority to limit or interfere in any way with the power of the County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no force and effect.

Dated: NOV 18 1993

/s/ William Huss
Judge of the
Superior Court

Prepared and submitted by:

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By /s/ Beverly Tillett Pine
Beverly Tillett Pine
One of Plaintiffs' Attorneys

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEGGY ANN BUCKLEY and JOHN W. BUCKLEY, Plaintiffs, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Defendants.	CASE NO. BC044916 JUDGMENT AFTER TRIAL BY COURT ON BIFURCATED ISSUES (Filed Dec. 17, 1993)

Pursuant to this Court's bifurcation order of April 5, 1993, trial commenced before the Honorable William Huss, Judge Presiding, on August 23, 1993 on the following issues:

> (1) Whether or not the entire lot owned by plaintiffs Peggy Ann Buckley and John W. Buckley, located at 6815 Dume Drive, Malibu, California ("the Lot") is exempt from Coastal Development Permit requirements; and
>
> (2) Whether or not the California Coastal Commission ("the Commission") may in any way limit plaintiffs' compliance with the nuisance abatement orders issued by the County of Los Angeles ("the County") with respect to the Lot.

Appearing for plaintiffs Peggy Ann Buckley and John W. Buckley were Eliot G. Disner, Esq. and Beverly Tillett Pine, Esq. Appearing for defendant California Coastal

Commission was Terry Fujimoto, Esq. Appearing for defendant the County of Los Angeles was Paul I. Yoshinaga, Esq.

Documentary evidence having been presented by both parties, and the cause having been argued and submitted for decision, and the Court having filed its Statement of Decision on Nov. 18, 1993, 1993:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The Lot in its entirety is exempt from the Coastal Development Permit requirements of the Coastal Act, PRC § 30000 *et seq.*

2. The Commission has no authority to limit or interfere in any way with the power of the County to declare, prohibit, and/or order and proscribe the manner of abatement of nuisances with respect to the Lot. Accordingly, the Commission's stop work orders bearing violation file number V-5-MAL-91-025 are void and of no force and effect.

Dated: DEC 17 1993

/s/ William Huss
Judge of the Superior Court

APPENDIX G

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CALIFORNIA COASTAL COMMISSION, Plaintiff, vs. PEGGY ANN BUCKLEY and JOHN BUCKLEY, Defendants.	CASE NO. SC015614/ BC044916 STATEMENT OF DECISION
PEGGY ANN BUCKLEY and JOHN BUCKLEY, Cross-Complainants, vs. CALIFORNIA COASTAL COMMISSION, COUNTY OF LOS ANGELES, Cross-Defendants.	(Filed Apr. 6, 1995)

On December 20, 1991, Peggy Ann Buckley and John W. Buckley ("the Buckleys") filed Case Number BC 044 916. Thereafter, on March 5, 1992, the California Coastal Commission ("Commission") filed Case Number SC 015 614. On May 11, 1992, the Buckleys filed a Cross-Complaint in Case Number SC 015 614 seeking declaratory relief identical to that in Case Number BC 044 916 and, in addition, damages for an unlawful taking of their property. Case Number SC 015 614 was transferred to this

Court from the West District of the Los Angeles County Superior Court. Thereafter, on April 15, 1993, the two cases were ordered consolidated for trial on bifurcated legal issues.

The Court, by its Statement of Decision on November 18, 1993, in Case No. BC044916 (incorporated by reference herein), found that an undeveloped lot located at 6815 Dume Drive, Malibu, California ("the Lot") owned by cross-complainants the Buckleys was exempt from the jurisdiction of the Commission. On December 17, 1993, the Court ordered the cases severed and the remainder of Case Number SC 015 614 was set for trial.

By Order of November 28, 1994, the Court summarily adjudicated that the Commission's assertion of jurisdiction over the Lot constituted a per se taking of the Lot under the Fifth and Fourteenth Amendments of the United States Constitution and under Article 1, Section 19 of the California Constitution, for which just compensation must be paid.

Between January 4 and January 26, 1995, trial ensued with respect to the following unresolved issues:

> (1) the nature, extent and duration of the Commission's regulatory taking of the Lot.
>
> (2) The damages caused to the Buckleys by the Commission as a consequence of its unlawful taking of the Lot.

At trial Eliot G. Disner, Esq. appeared for John W. Buckley. Thomas M. Banks, Esq. appeared for Peggy Ann Buckley. Terry T. Fujimoto, Esq. and Alan V. Hager, Esq. appeared for defendant Commission. Documentary evidence was introduced and oral testimony taken on behalf

of the respective parties. On January 31, 1995, the Court personally viewed the Lot with Messrs. Disner, Banks and Fujimoto in attendance. Thereafter, written arguments were filed with the Court and the case then submitted for decision. On March 16, 1995, the Court held a further hearing at which Messrs. Disner, Banks, Fujimoto and Hager appeared.

The Court, having thus considered all the evidence and having heard the arguments of counsel and being now fully advised, finds in this Statement of Decision the following facts:

1. By its Statement of Decision filed November 18, 1993 in Case Number BC 044 916, this Court made the following findings which are adopted herein:

> (a) In January, 1988, the Buckleys purchased the Lot which consisted of a vacant residential lot on which they planned to build a single-family residence.
>
> (b) The Lot is located in a developed single-family residential community.
>
> (c) On October 24, 1989, the County of Los Angeles ("County") certified that "the [L]ot and the proposed single-family residence meets the requirements of Section 30610.1(c) of the Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act". On that date, the County issued a Certificate of Exemption, pursuant to Public Resources Code §30610.2. The County timely sent a copy of said Certificate to the Commission which went unchallenged by the Commission within the time period required therefor.

(d) Between October, 1989 and March, 1991, the County then issued grading and building permits calling for the grading and construction of a single-family residence on the Lot.

(e) The Commission has no authority to limit in any way the power of the "County to declare, prohibit and abate nuisances (PRC §30005), including the issuance of any stop work orders".

(f) The Commission cannot legally claim jurisdiction over any portion of the Lot.

2. On August 15, 1989, the Commission first attempted to exercise its jurisdiction on the Lot. It then and thereafter issued to the Buckleys written threats and stop work notices, the intent being to prevent any development thereon. The Commission suggested that the Buckleys obtain a County Certificate of Exemption for the Lot, which they did. The Commission then never challenged the issuance of said Certificate. At all pertinent times, no portion of the Lot could be developed without grading it in its entirety, in accordance with the grading plans approved and permitted by the County for the development of the entire lot.

3. As of at least October 24, 1989 then, the Commission had no jurisdiction over the Lot, or any part thereof. Thereafter and to the present, the Commission has continued to assert its claim of jurisdiction over the Lot and prevented development thereon. The Commission has represented to the Court, through its counsel, that it will continue to claim its jurisdiction until all appeals are exhausted.

4. The assertion of jurisdiction by the Commission over the Lot constitutes a per se taking thereof. Said taking did not advance the legitimate interests of the State of California and was arbitrary and capricious. By its taking, the Commission also denied to the Buckleys any economically viable use of the Lot.

5. The Buckleys in the third cause of action to their Cross-Complaint alleged a conflict in jurisdiction over the development of the Lot between the County and the Commission, seeking therein a declaration to determine which entity has jurisdiction over development of "the Lot". The Court now finds that the County has jurisdiction over the development of "the Lot" to the same degree that it had jurisdiction as of October 24, 1989, the date said Calvo Certificate of Exemption was issued.

6. The taking of the Lot by the Commission was permanent.[1]

7. In March, 1991, a landslide developed on "the Lot". On March 26, 1991, the Commission hand delivered a stop work order referenced "Violation File Number: V-5-MAL-91-025" to plaintiffs notifying them again that no grading would be permitted on the property, that a Coastal Permit had not been issued for the project and that any additional unpermitted work on the site would be considered a knowing and intentional violation of the Coastal Act, which would subject plaintiffs to heavy monetary fines and penalties. On June 11, 1991, the Commission hand delivered a second stop work notice with

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[1] The appropriate measurement and elements for a *temporary* taking do not apply.

respect to the Lot. On November 12, 1991, the Department of Public Works for the County ordered plaintiffs to perform grading on the Lot pursuant to the grading permit issued by the County to abate the hazardous condition on the Lot identified in the geotechnical reports reviewed by the County. On December 5, 1991, the Commission hand delivered a third stop work notice with respect to the entire Lot. These arbitrary and capricious acts of the Commission are the proximate cause of the landslide and egregious erosion which are continuing on the property, resulting in permanent damage, in addition to potential liability to the owners of the property adjoining the landslide. The Court has confirmed that the landslide and erosion continues to this day.

8. The Buckleys had intended to sell the Lot in or about the Fall of 1989. John Buckley testified that after he and his wife, Peggy Ann, acquired the Lot in January, 1988, he suffered serious health problems and contemplated slowing down, such that he was not then willing to assume the financial burden (that he could have otherwise borne), for the 15,000 square foot house they had planned to build there. However, the Buckleys were unsuccessful at marketing the Lot after the Fall of 1989, due to the Commission's unlawful taking of the Lot.

9. The date of valuation is May 1, 1990. Given the average time it took in the Fall of 1989 to sell undeveloped property in Malibu, the Buckleys would reasonably have done so at or about May 1, 1990, but for the Commission's unlawful taking of the Lot.

10. The Buckleys had a duty to mitigate their losses, that is attempt to keep the erosion from adjacent

undisputed jurisdiction areas, which they did. The Buckleys had no obligation to mitigate by applying to the Commission a second time for a Coastal Development Permit because it would have been futile to do so and because the Commission had no jurisdiction in the first place.

11. For purposes of valuation, there is no "comparable" market for the Lot, as that term is defined in Evidence Code §816. The properties chosen by the testifying experts provide guidance to the Court in its determination of value, but none is "sufficiently alike in respect to character, size, situation, and usability" to the Lot. There is no evidence that the other properties are sufficiently similar to the Lot in topography or view. Also, none of the chosen properties included plans and permits to construct a 15,000 square foot or similar residence. Further, none of the other properties was shown to be free of the Commission's jurisdiction (by the applicability of a Calvo Certificate of Exemption or otherwise), nor did any have extensive erosion or landslide damage like the Lot, nor was any involved in continuing litigation with the Commission (with one exception).

12. The valuation of the Lot on May 1, 1990 is based on the assumption that the highest and best use of the Lot then was its development pursuant to the plans and permits issued by the County of Los Angeles at or about that time. Those plans and permits would have permitted the expansion of the usable acreage of the Lot from 1.2 to at least 1.75 acres and the construction of a 15,000 square foot residence thereon.

13. The valuation of the Lot now is also based on its highest and best use, which is believed to be its value to a speculator who will need to remedy the landslide, wait until the conclusion of this case when the issue of the Commission's lack of jurisdiction is finally resolved, and probably start the planning and permitting process anew to conform to laws and regulations not applicable to the Lot in 1990.

14. Pursuant to Evidence Code §823, the Court takes into account, inter alia, the following evidence to determining valuation that is just and equitable at both times:

(a) other properties compared and contrasted to the Lot by the expert witnesses, including developed properties with the value of their respective developments extracted;

(b) the estimates of real estate brokers whose opinions were reported;

(c) the expert assumptions made about the risks that a reasonable buyer would now be likely to assume in light of the pendency of this litigation;

(d) estimates of the marketability of the Lot;

(e) the effect of the physical condition of the Lot;

(f) the effect of the present doubtful status of the plans and permits for the Lot; and

(g) the opinions of value provided by the expert witnesses and by owner John Buckley.

15. Taking the foregoing factors into account, the value of the Lot as of May 1, 1990 was $1.2 Million. The present value of the Lot is $250,000.

16. Since the Buckleys planned to *sell* the Lot, rather than develop and keep it, just compensation here is the sum of:

(a) the difference in the value of the Lot on May 1, 1990 and the date of Judgment herein, during which the Buckleys involuntarily owned the Lot;

(b) the monies lost from the inability of the Buckleys to use the proceeds they would have received upon the sale of their Lot, calculated per CCP §§[1268.311] and 1268.350;

(c) the costs incurred to hold and maintain the Lot after the taking, which would not have been incurred but for the taking;

(d) the costs incurred dealing with the Commission after the taking, in a futile attempt by the Buckleys to win its approval, which costs also would not have been incurred but for the taking; and

(e) the reasonable attorney, appraisal and engineering fees and costs incurred, per CCP §1036.

17. The damages proximately caused to the Buckleys by the unlawful taking of their Lot by the Commission are as follows:

(a) $950,000, the difference in the Lot's value on May 1, 1990 ($1,200,000) and its value at the time of trial ($250,000);

(b) prejudgment interest of $306,698;

(c) holding costs of $48,130, plus interest of $8,139 thereon;

(d) expenses and costs related to dealing with the Commission of $35,992, plus interest of $6,878 thereon; and

(e) attorneys', consultant and related fees and costs in a sum to be determined prior to the entry of Judgment herein.

18. The Buckleys are entitled to recover the sum of $1,355,837, excluding attorneys and related fees and costs.

The legal basis for the Court's Decision is:

1. Pursuant to PRC §30005, the Commission has no authority to limit in any way the power of the County to declare, prohibit and abate nuisances, including the issuance of an stop work orders. Furthermore, the Lot in its entirety is exempt from the Coastal Development Permit requirement of the Coastal Act, PRC §30000 *et seq*. Therefore, the acts of the Commission constituted a taking under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I, Section 19 of the California Constitution.

2. The County determined that the Lot met the statutory requirements for exemption from coastal development permit requirements, pursuant to PRC §30610.1(c), and issued a Certificate of Exemption from the coastal development permit requirements of the Coastal Act for said Lot in accordance with PRC §30610.2. The Commission did not challenge the County-issued Certificate of Exemption, pursuant to CCP §1085.

3. There was a permanent taking of the Lot by the Commission. *Lucas v. South Carolina* (1992) ___ U.S. ___, 112 S.Ct. 2886, *San Diego Gas & Electric Company v. City of San Diego* (1981) 450 U.S. 621.

4. The Buckleys had a duty to mitigate their losses, which they did. The Buckleys are also entitled to recover the costs they incurred in so doing. *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250.

5. The determination of just compensation in a takings case is fact intensive *Florida Rock Industries, Inc. v. U.S. (Fed. Cir. 1994) 18 F.3d 1560.*

6. The amount of damages related to the permanent taking here is the difference in value of the Lot as of May 1, 1990 and the value as of the time of the litigation. *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, *Lucas, supra.* Also included in the damage award are the holding costs. *United States v. General Motors Corp.* (1945) 323 U.S. 373.

7. The Buckleys are entitled to prejudgment interest. *Glendale Redevelopment Agency v. Parks,* (1993) 18 Cal. App. 4th 1409. This is calculated by multiplying the difference in the Lot's value between May 1, 1990 and this date by the applicable rate of earnings of the Surplus Money Investment Fund (CCP §§1268.311 and 1268.350).

8. Pursuant to CCP §1036, the Buckleys are entitled to reimbursement of their attorneys fees and related fees and costs in this inverse condemnation proceeding.

IT IS SO ORDERED.

Dated: April 6, 1995

/s/ William Huss
WILLIAM HUSS
Judge

APPENDIX H

SUPERIOR COURT FOR THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES

CALIFORNIA COASTAL COMMISSION, Plaintiff, vs. JOHN BUCKLEY, PEGGY ANN BUCKLEY, and DOES 1-50 inclusive, Defendants.	CASE NO. SC015614/ BC044916 JUDGMENT
JOHN W. BUCKLEY, PEGGY ANN BUCKLEY, Cross-Complainants, vs. CALIFORNIA COASTAL COMMISSION; COUNTY OF LOS ANGELES, and DOES 1-50, inclusive, Cross-Defendants.	(Filed Jul. 12, 1995)

On December 20, 1991, Peggy Ann Buckley and John W. Buckley ("the Buckleys") filed Case Number BC 044 916. On March 5, 1992, the California Coastal Commission ("Commission") filed Case Number SC 015 614. On May 11, 1992, the Buckleys filed a Cross-Complaint in Case Number SC 015 614 seeking declaratory relief identical to that sought in Case Number BC 044 916 and, in addition, sought damages for the claimed unlawful taking of their property by the Commission. Case Number SC 015 614

was transferred to this Court from the West District of the Los Angeles County Superior Court. Pursuant to Stipulation of counsel on April 5, 1993, Case Number SC 015 614 was consolidated with Case Number BC 044 916, and the issues tried and judgment entered in Case Number BC 044 916 are now res judicata in Case Number SC 015 614.

The Court thereafter, in Case Number BC 044 916, found that an undeveloped lot located at 6815 Dume Drive, Malibu, California ("the Lot") owned by the Buckleys was exempt form the jurisdiction of the Commission (November 18, 1993 Statement of Decision, incorporated by reference herein).

The Court thereafter, in Case Number SC 015 614, summarily adjudicated that the Commission's assertion of jurisdiction over the Lot constituted a per se taking of the Lot under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I, Section 19 of the California Constitution, for which just compensation must be paid (November 28, 1994 Order incorporated by reference herein).

Pursuant to this Court's Order of December 17, 1993, trial of the remaining issues in Case Number SC 015 614 commenced on January 4, 1995. The issues left to be resolved at said trial were:

> (1) The nature, extent and duration of the Commission's regulatory taking of the Lot.
>
> (2) The damages caused to the Buckleys by the Commission's unlawful taking of the Lot.

At trial Eliot G. Disner, Esq. appeared for John W. Buckley. Thomas M. Banks, Esq. appeared for Peggy Ann

Buckley. Terry T. Fujimoto, Esq. and Alan V. Hager, Esq. from the California Department of Justice appeared for the Commission.

The Court, having considered all of the evidence, both oral and documentary, having personally viewed the Buckleys' property, and after considering the written and oral arguments of counsel, entered its Statement of Decision in this matter on April 6, 1995 (which is also incorporated by reference herein).

The Buckleys' Motions for Attorney's Fees and Costs reasonably incurred in connection with this proceeding, pursuant to C.C.P. §§1021.5 and 1036, and came on for hearing on May 26, 1995. The Court having considered all of the evidence with respect thereto, as well as having considered the written and oral arguments of counsel, then ruled that the Buckleys' fees, costs, disbursements and expenses actually incurred by them or their attorneys in this consolidated proceeding have been reasonable and that they are entitled to reimbursement therefor, specifically as set forth hereinbelow.

In accordance with the foregoing, it is HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Commission has no jurisdiction over the Lot. To the extent that it attempted to exert jurisdiction over the Lot, or any part of it, it did so improperly. The Commission's actions have not substantially advanced any legitimate state interests, instead denied to the Buckleys the economically viable use of the Lot. Therefore, the Commission's assertion of jurisdiction over the Lot constitutes a per se taking of the Lot under the 5th and 14th

Amendments of the United States Constitution and Article I, Section 19 of the California Constitution;

2. The County of Los Angeles ("County") has jurisdiction over the Lot to the same degree that it had jurisdiction as of October 24, 1989, as if the Commission had never attempted to assert its jurisdiction thereover;

3. The Commission may not interfere with, or limit in any way, any effort by the County to declare, prohibit or abate any nuisance on the Lot;

4. The Commission shall pay to the Buckleys just compensation caused by said taking in the sum of $1,355,837.00;

5. The Commission shall pay to Eliot G. Disner the sum of $328,169.50 as and for his reasonable attorney's fees;

6. The Commission shall pay to Thomas M. Banks the sum of $102, 104.16 as and for his reasonable attorneys fees;

7. The Commission shall pay to the Buckleys the sum of $229,262.94 as and for costs, disbursements and expenses reasonably incurred by them;

8. The Commission shall pay to Eliot G. Disner the sum of $86,796.43 as and for costs, disbursements and expenses reasonably incurred by him for John Buckley;

[Text Deleted In Original]

10. The Commission shall pay to Peggy Ann Buckley the sum of $85,161.73 as and for costs, disbursements and expenses reasonably incurred by her.

IT IS SO ORDERED.

Dated: JUL 12 1995

/s/ William Huss
Judge of the Superior Court

APPENDIX I

Certification Form for Local Government to Use for Single-family Development Permits Only in Areas Designated by the Commission

On October 24, 1989 Peggy Ann Buckley applied for a permit to construct a single-family residential development on an existing vacant (as of January 24, 1980) parcel located at 6815 Dume Dr., Malibu which is within an area designated by the California Coastal Commission pursuant to Section 30610.1 of the Public Resources Code.

Pursuant to Section 30610.2 of the Public Resources Code the County of Los Angeles has determined that the construction of this single-family residence meets all of the following lot criteria:

[X] (1) The construction of the single-family residence on the lot is not located between the first public road and the sea or immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach.

(Please attach a copy of Commission's 8½" x 11" quad map showing location of parcel within designated area.)

[X] (2) (a) The lot is a legal lot pursuant to Section 702.1A of Ordinance No. 1494 as of January 1, 1980.

(b) The lot also conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances. (Please attach a copy or statement

referencing the applicab[illegible] general plan.)

[X] (3) The construction of the single-family residence on the lot is not located within an area known to the County of Los Angeles, or designated by any other public agency, as a geologic hazard area or as a flood hazard area. *OR* although the lot is located within an area recognized as a geologic hazard area by ___ (or flood hazard area by ___) it has been determined by County of Los Angeles to be a safe site for the construction of a single-family residence.

[X] (4) The construction of the single-family residence on the lot, located at 6815 Dume Dr., is no more than 250 feet from an existing improved road that meets minimum County requirements for fire and emergency vehicular use throughout the year.

[X] (5) The residence can be served by an adequate water supply that is legally available for use (by means of a well) *OR* (by means of a connection to a water system with sufficient capacity to serve such lot and no such connection will require the extension of an existing water main which has the capacity of serving four or more additional single-family residential structures).

Therefore, Los Angeles County hereby certifies that 6815 Dume Dr. lot and proposed single-family residence meets

the requirements of Section 30610.1(c) of Public Resources Code and is thereby exempt from the coastal development permit requirements of the Coastal Act.

/s/ Rose C. Hamilton	10-24-89
(Signed)	(Dated)

APPENDIX J

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 WEST BROADWAY, SUITE 380
LONG BEACH, CA 90802
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

Date: March 26, 1991

Property Location:
6815 Dume Dr. Malibu, Los Angeles County.

Violation File Number: V-5-MAL-91-025

NAME John and Peggy Buckley
ADDRESS 6815 Dume Dr
CITY ZIP Malibu 90265

Dear Mr. and Mrs. Buckley:

You are hereby notified to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation carries with it certain monetary penalties. Pursuant to Section 30820 of the Act, a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that

in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend at our office if you have any questions regarding this matter.

Sincerely,

/s/ Teresa Henry for
Pam Emerson
Enforcement Supervisor

XX:PE
0007V

STATE OF CALIFORNIA - THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 WEST BROADWAY, STE 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

Date: June 11, 1991

Property Location:
6815 Dune [sic] Dr. Malibu, Los Angeles County.

Violation File Number: V-5-MAL-91-025

NAME John and Peggy Ann Buckley
ADDRESS 6815 Dume Dr
CITY ZIP Malibu 90265

Dear Mr. and Mrs. Buckley:

You are hereby notified to stop all unpermitted work. No grading is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation carries with it certain monetary penalties. Pursuant to Section 30820 of the Act, a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousand dollars ($5000) per day for each day in which such violation occurs.

Please contact Barbara Carey at our office if you have any questions regarding this matter.

Sincerely,

/s/ Teresa Henry for
Pam Emerson
Enforcement Supervisor

MS:PE
3562C

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 W. BROADWAY, STE. 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

DATE 12/5/91

Property Location: 6815 Dume Drive

Violation File Number: V-5-MAL-91-025

Ms. Peggy Ann Buckley
6815 Dume Drive
Malibu, CA

Dear Ms. Buckley:

You are hereby notified to stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation may carry with it certain monetary penalties. Section 30820 of the Act provides that a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821

states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousands dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend or Pam Emerson at our office if you have any questions regarding this matter.

Sincerely,

/s/ Pam Emerson
Pam Emerson
Enforcement Supervisor

Enforcement Officer

1147:PE/025_V

STATE OF CALIFORNIA – THE RESOURCES AGENCY
PETE WILSON Governor
[SEAL]

CALIFORNIA COASTAL COMMISSION
SOUTH COAST AREA
245 W. BROADWAY, STE. 380
P.O. BOX 1450
LONG BEACH, CA 90802-4416
(213) 590-5071

STOP WORK STOP WORK STOP WORK STOP WORK

HAND DELIVERY

DATE 12/5/91

Property Location: 6815 Dume Drive

Violation File Number: V-5-MAL-91-025.

Contractor,

John Doe 1---XX

Ms. Peggy Ann Buckley
6815 Dume Drive
Malibu, CA

Dear Contractor or other worker:

You are hereby notified to stop all unpermitted work. No grading or construction or landfill is permitted on this property. A Coastal Permit has not been issued for this project.

Any additional unpermitted work on this site will be considered a knowing and intentional violation of the Coastal Act. This type of violation may carry with it certain monetary penalties. Section 30820 of the Act provides that a civil fine not to exceed ten thousand dollars ($10,000) may be assessed against any person who violates any portion of the Act. Furthermore, Section 30821 states that in addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Act shall be subject to a civil fine of not less than fifty dollars ($50) nor more than five thousands dollars ($5000) per day for each day in which such violation occurs.

Please contact Susan Friend or Pam Emerson at our office if you have any questions regarding this matter.

Sincerely,

/s/ Pam Emerson
Pam Emerson
Enforcement Supervisor

Enforcement Officer

1147:PE/025_V

APPENDIX K

Calif. Public Resources Code

§ 30610.1. Single family residence construction; criteria

(a) Prior to certification of the applicable local coastal program, no coastal development permit shall be required for the construction of a single-family residence on any vacant lot meeting the criteria set forth in subdivision (c) and located in a specified area designated by the commission pursuant to subdivision (b).

(b) Within 60 days from the effective date of this section, the commission shall designate specific areas in the coastal zone where the construction of a single-family residence on a vacant lot meeting the criteria set forth in subdivision (c) shall not require a coastal development permit. Areas shall be designated for the exclusion provided for in this section if construction of single-family residences within the area to be designated has no potential, either individually or cumulatively, for significant adverse impacts on highly scenic resources of public importance, on environmentally sensitive areas, on prime agricultural land or on agricultural lands currently in production, or on public access to or along the coast.

In addition, if septic tanks will be required or used, an area identified as having septic tank problems by the appropriate regional water quality control board or the State Water Resources Control Board in an approved basin plan or by other formal action of such board may not be designated for exclusion pursuant to this section.

(c) Within areas designated pursuant to subdivision (b), no coastal development permit shall be required for

the construction of a single-family residence on any vacant lot which meets all of the following criteria:

(1) It is not located between the first public road and the sea or immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach.

(2) Is a legal lot as of the effective date of this section and conforms with the minimum lot size and lot use designations of the applicable general plan and zoning ordinances.

(3) Is not located within an area known to the affected local government, or designated by any other public agency, as a geologic hazard area or as a flood hazard area, or, if located within such an area, it has been determined by the affected local government to be a safe site for the construction of a single-family residence.

(4) Is no more than 250 feet from an existing improved road adequate for use throughout the year.

(5) Can be served by an adequate water supply that is legally available for use either by means of a well or by means of a connection to a water system with sufficient capacity to serve such lot or lots; provided, that no such connection shall require the extension of an existing water main which would have the capacity of serving four or more additional single-family residential structures.

(d) The commission shall, within 120 days from the effective date of this section, specify uniform criteria that shall be used to determine the location of "the first public

road" and the inland extent of any beach for purposes of paragraph (1) of subdivision (c).

(e) Within 30 days after the 120-day period specified in subdivision (b), the commission shall report to the Legislature and the Governor what has been done to carry out the provisions of this section.

(f) The provisions of this section shall apply notwithstanding any other provision of this division to the contrary.

Calif. Public Resources Code

§ 30610.2. Single family residence construction; certification of exemption

(a) Any person wishing to construct a single-family residence on a vacant lot within an area designated by the commission pursuant to subdivision (b) of Section 30610.1 shall, prior to the commencement of construction, secure from the local government with jurisdiction over the lot in question a written certification or determination that the lot meets the criteria specified in subdivision (c) of section 30610.1 and is therefore exempt from the coastal development permit requirements of this division. A copy of every certification of exemption shall be sent by the issuing local government to the commission within five working days after it is issued.

(b) If the commission does not designate the areas within the coastal zone as required by subdivision (b) of

section 30610.1 within the 60 days specified therein, a local government may make the certification authorized by subdivision (a) of this section without regard to the requirements of subdivision (b) of section 30610.1.

(2)

Supreme Court, U.S.
FILED
JAN 24 1999
CLERK

No. 98-1894

IN THE

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

RESPONDENT'S BRIEF IN OPPOSITION

BILL LOCKYER
Attorney General of the State of California
RICHARD M. FRANK
Chief Assistant Attorney General
JAN S. STEVENS
Acting Assistant Attorney General
ALAN V. HAGER*
Deputy Attorney General
TERRY T. FUJIMOTO
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013
(213) 897-2701

* *Counsel of Record*

Attorneys for Respondent

153544

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

1 pp

QUESTION PRESENTED

Did the California Coastal Commission engage in a temporary taking where the property owner was not prevented from building a house on her residential lot but prevented only from grading in a ravine on that lot pending resolution of a jurisdictional controversy?

LIST OF PARTIES

Peggy Ann Buckley, the petitioner

John Buckley, Peggy Ann Buckley's former husband and a separately represented party in the proceedings below

The California Coastal Commission, an agency of the State of California, created pursuant to the California Coastal Act (Cal. Pub. Resources Code §§ 30000 *et seq.*), the respondent

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OPINION BELOW

The petition seeks review of a final decision of the California Court of Appeal, Second Appellate District, Division Two, which is in a published opinion reported as *Buckley v. California Coastal Commission*, 68 Cal. App. 4th 178, 80 Cal. Rptr. 2d 562 (1998).

STATEMENT OF THE CASE[1]

Petitioner Peggy Ann Buckley and John Buckley (the Buckleys) own a 2.75-acre residential lot in the Point Dume area of Malibu.[2] The lot is rectangular in shape, running lengthwise from east to west. The front portion of the lot, which borders the street, is on the east and is level. The rear or west portion descends rather steeply into a ravine. The Buckleys wanted to build a house on the front portion. Their original plan called only for grading and building on the front portion. There would be no development in the rear. (App. 2-4.)

The front portion of the lot is situated in what has come to be referred to as a "Calvo exempt" area. The name comes from the state legislator who sponsored legislation, codified in California Public Resources Code §§ 30610.1 and 30610.2, providing an exemption from the Coastal Commission's permit jurisdiction. The exemption is for the

1. The statement of the case is taken from the reported opinion below. Citations to that opinion, which is appended to the Petition for Writ of Certiorari, will be provided by referring to the Appendix (App.) and the page number.

2. Whether the ownership of the property has changed as a consequence of the Buckleys' divorce is not shown by the record.

limited purpose of constructing a single-family residence and applies to certain areas designated by the Coastal Commission that meet certain geographical criteria. When designating "Calvo exempt" areas, the Coastal Commission included in the exempt area the front portion of the Buckleys' lot, but excluded the rear portion because it was "environmentally sensitive." The Coastal Commission informed the Buckleys that under these designations, they did not need a coastal development permit to build a single-family residence on the front portion of their lot. They would, however, need a coastal permit for any development on the rear portion and any development other than a single-family residence on the front portion. (App. 4.)

The Buckleys later decided that in addition to grading the front portion of their lot in preparation for construction of a single-family home, they would grade the rear portion to provide pads for a garden, a riding ring or a tennis court, and a guest house. They applied for a coastal permit for the grading in the ravine. At the hearing before the Coastal Commission on their permit application, the Buckleys for the first time voiced their belief that the grading in the ravine was required to alleviate a landslide. The Coastal Commission denied the permit application on the ground that the extensive grading proposed by the Buckleys was inconsistent with the environmentally sensitive habitat policies of the Coastal Act. The Buckleys did not challenge the permit denial. (App. 5-6.)

Notwithstanding the Coastal Commission's denial of the permit, the Buckleys began grading the rear portion of their lot pursuant to their extensive grading plan that had been approved by the County of Los Angeles. The Coastal Commission issued an order to the Buckleys to stop the

grading until they obtained a coastal permit. Then a County geologist ordered the Buckleys to abate the landslide on the rear portion of their lot by pursuing the County-approved grading plan. The Buckleys sought an emergency permit from the Coastal Commission to pursue this grading plan. The Coastal Commission denied the application because the County-approved plan provided more grading than was needed to abate the hazard created by the landslide. When the Buckleys continued with the grading in the ravine, the Coastal Commission issued another stop-work order. (App. 6-8.)

The Buckleys filed a declaratory relief action against the Coastal Commission contending, contrary to their position during the Commission's permit hearings, that the Coastal Commission lacked jurisdiction over any development on their property. The Coastal Commission sued the Buckleys to enjoin the grading and to impose civil penalties for the impermissible activity. The Buckleys cross-complained for damages. The cases were consolidated. The declaratory relief cause of action was severed so that it could be tried first. The trial court ruled that the Coastal Commission had no jurisdiction over any portion of the Buckleys' lot. Based upon this determination, the trial court then ruled that the Coastal Commission's mistaken assertion of jurisdiction was a permanent taking of the Buckleys' lot and ordered that the case proceed to trial on the amount of damages that should be awarded for this taking. The trial court awarded the Buckleys $1,355,837 in damages and $831,494.76 in attorney fees. (App. 8.)

The Court of Appeal initially affirmed the trial court's determination that the Coastal Commission had no jurisdiction over the rear portion of the Buckleys' lot and

reversed its determination that the mistaken assertion of jurisdiction was a taking. The Court of Appeal premised its finding that there was no taking on substantial evidence in the record that the Buckleys were not deprived of economically beneficial use because they were free at all times to build their house on the level front portion of their lot. The Buckleys petitioned the California Supreme Court for review of the Court of Appeal's decision. The California Supreme Court granted the petition and then remanded the case to the Court of Appeal for reconsideration in light of its decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841 (1998), *cert. denied*, 119 S. Ct. 179 (1998). (App. 37.) On reconsideration, the Court of Appeal, this time citing *Landgate*, reaffirmed its determinations that the Coastal Commission had mistakenly asserted its jurisdiction and that there was no evidence that the delay occasioned by the mistaken assertion of jurisdiction deprived the Buckleys of substantially all economically beneficial use of their lot. (App. 20-32.) The Buckleys again petitioned the California Supreme Court for review. Their petition was denied. (App. 36.)

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO ADDRESS HOW THE *BUCKLEY* DECISION PRESENTS AN ISSUE SUPPORTING THE GRANT OF CERTIORARI

The Petition for Writ of Certiorari is largely a diatribe setting forth the petitioner's opinion of regulatory takings law in California. The premise of the petition is that the

grant of a writ of certiorari is warranted simply because *Buckley* is an inverse condemnation case decided by a California court. The petition is directed primarily at the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006, *cert. denied*, 119 S. Ct. 179 (1998). The *Landgate* petition, however, already has been denied. The California Court of Appeal, acting at the direction of the California Supreme Court, cited *Landgate* in confirming its initial decision that the facts in *Buckley* fail to show that there was a temporary taking. It is the *Buckley* case, however, for which review is being sought, and the *Buckley* case is one in which there is no substantial evidence to support a taking.

The portion of the petition arguing the reasons why the writ should be granted in this case consumes twenty-three pages. Only six of those pages even address the *Buckley* decision. More importantly, nothing in those six pages explains how *Buckley* fails to apply correctly this Court's takings decisions or how *Buckley* conflicts with those decisions. The six pages ignore the *Buckley* court's determination that there was no evidence supporting a finding that the Coastal Commission's actions denied the Buckleys all economically beneficial or productive use of their land, the basis for finding a taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). There is nothing about how the delays in *Buckley* were not "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" and, therefore, not temporary takings under *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). Finally, there is no attempt to show that the Coastal Commission did more than assert its regulatory jurisdiction to require a permit before grading was begun and, therefore,

extended its actions beyond those found not to be a taking in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985).

The six pages relating to *Buckley* simply say that the Buckleys were faced with a choice of either surrendering their constitutional rights to build on their land or surrendering their right to be compensated for the taking of their land. That is hardly how the California Court of Appeal described the situation. The Buckleys were free to build their home on the level front portion of their lot, over which the Coastal Commission acknowledged it had no jurisdiction, while they pursued their challenge to the Coastal Commission's assertion of jurisdiction over the rear portion of their lot through the judicial process. (App. 20-25.) This Court does not retry issues of fact determined by a competent state court. *Portland Ry. Co. v. Oregon R.R. Comm.*, 229 U.S. 397, 412 (1913). Therefore, the question is whether under these facts, the California Court of Appeal properly applied this Court's takings decisions to reach its conclusion that there was no temporary taking of the Buckleys' lot.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IN *BUCKLEY* CORRECTLY APPLIED EXISTING TAKINGS LAW IN CONCLUDING THAT THERE WAS NO TEMPORARY TAKING

A. The Court of Appeal in *Buckley* Relied on Substantial Evidence that the Coastal Commission was Pursuing Legitimate State Interests and had not Deprived the Buckleys of Economically Beneficial Use of their Land.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016, and then again in *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994), this Court reaffirmed its statement in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that land use regulation is not a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land. If a government agency shows that in the course of its land use regulation it pursued legitimate public interests and did not deny all economically productive use of the land it was regulating, it cannot have engaged in a compensable taking. That is exactly the *Buckley* case.

Section 30610.1 of the California Public Resources Code authorized the Coastal Commission to designate specific areas in the coastal zone where construction of single-family residences would have no potential "for significant adverse impacts on highly scenic resources of public importance, on environmentally sensitive areas, on prime agricultural lands currently in production, or on public access to or along the coast." In those areas designated by

the Coastal Commission, no coastal development permit would be required for a single-family residence. The exempt area must also be a legal lot meeting the size and use designations of the applicable general plan.

The Coastal Commission designated the front portion the Buckleys' lot as exempt, but not the rear portion in the ravine because the ravine was an environmentally sensitive area. The trial and appellate courts said that the Coastal Commission erred by bisecting the Buckleys' lot into exempt and non-exempt parts. The appellate court reasoned that the Legislature had not authorized the splitting of lots into exempt and non-exempt parts and by exempting part of the Buckleys' lot, the Coastal Commission had forfeited its jurisdiction over the remainder. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 188-90.

Nonetheless, the Coastal Commission had been pursuing a legitimate governmental purpose by asserting jurisdiction over the rear portion of the lot that was an environmentally sensitive area. It believed that it could accomplish this goal by bisecting the lot and was told by the court that it had misapplied the statute. The delay was the product of the legitimate use of the judicial process to resolve the Coastal Commission's legitimate dispute with the Buckleys over how this exemption should have been applied to their lot. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 200-01.

Based on its exhaustive review of the factual record, the Court of Appeal concluded that development of the Buckleys' lot was not stymied by the Coastal Commission's mistaken assertion of jurisdiction over the rear portion. The Buckleys were free to build their house on the front portion

of their lot. This was the most important part of their development plans and the only thing that they wanted to do in the first place. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th at 194-97. They were hardly denied all economically beneficial or productive use of their land. Under this Court's temporary takings analyses, there is no taking where government, acting in pursuit of legitimate public interests when engaging in land use regulation, does not deny all economically productive use of the land. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 127; and *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. at 321.

B. The Delay was the Product of Normal Delays in the Regulatory Process.

The Court of Appeal in *Buckley* rested its decision on the facts showing that the Buckleys retained the ability to build their house on the front portion of their lot, which was their primary goal in developing this residentially zoned lot. The Buckleys' decision not to build the house, not any denial by the Coastal Commission of a permit to build, kept the property from being developed while the issue of the Coastal Commission's jurisdiction over the planned grading in the rear of the lot proceeded through the judicial process. Part of that process included the California Supreme Court's order to the Court of Appeal to reconsider its decision in light of *Landgate*. The Court of Appeal's discussion of *Landgate* was, at best, ancillary to its independent, fact-based finding that there were no grounds for a takings claim. This ancillary basis, nonetheless, is consistent with the teaching of *First English* that normal delays in the pursuit of legitimate regulatory goals do not constitute takings.

In *First English*, this Court assumed that a Los Angeles County ordinance prohibiting any building on the church's land located in a flood plain temporarily denied the church all use of its property. The Court then held that if this were so, the Just Compensation Clause requires compensation for that temporary taking. The Court limited its holding to the assumed fact situation. It expressly did not include within the scope of its holding denials of use resulting from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 313 and 321.

First English did not deal with the inevitable delay in development that occurs while a regulatory agency asserts jurisdiction and requires a permit. This issue already had been addressed in *Riverside Bayview Homes*. There, this Court determined that neither the imposition of a permit requirement nor the denial of a permit necessarily causes a taking. Only after a permit is denied and the denial prevents all economically viable use of the property is there a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 127.

Since *First English*, several courts, including the California Supreme Court in *Landgate*, have addressed whether a delay caused by a regulatory agency's mistaken assertion of jurisdiction or application of law is a taking or a "normal delay." In light of *First English* and other takings cases, including *Riverside Bayview Homes*, these federal and state courts have concluded that delays in development until judicial intervention rectifies a regulatory agency's mistake are among the "normal delays" to which this Court was referring in *First English*. *See, e.g., Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800-03 (Fed. Cir. 1993) (no

taking where Army Corps of Engineers mistakenly asserted permit jurisdiction by issuing cease and desist order and development "effectively stopped" until court corrected mistake); *Smith v. Town of Wolfeboro*, 615 A.2d 1252, 1257 (N.H. 1992) (no taking for delay where erroneous planning board decision declaring lot unsuitable for residential development was ultimately set aside by court, noting that appeals to the courts of mistaken agency decisions are part of the governmental decision making process); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass. 1992), *cert. denied*, 508 U.S. 909 (1993) (delay caused while seeking and obtaining judicial invalidation of municipal regulation beyond the authority of city to adopt not a taking); *Lujan Home Builders, Inc. v. Town of Orangetown*, 568 N.Y.S.2d 850, 851 (N.Y. Sup. 1991) (no taking for developmental delay while securing judicial relief from erroneous planning board decision); and *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.*, 33 Cal. App. 4th 211, 221-22, 39 Cal. Rptr. 2d 266 (1995) (no taking where agency's mistaken assertion of jurisdiction overturned by court).

The California Supreme Court in *Landgate*, after citing all and discussing most of the above cases, concluded that certain errors, ones that involve the passage or enforcement of a law or regulation that deprives property of all value, are compensable takings under the teaching of *First English*. "But government land use regulations and decisions . . . which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine reviewed above." *Landgate*, 17 Cal. 4th at 1020. If government had to respond in damages for a taking for the delay consumed

by every successful judicial challenge to a regulatory agency's invocation of jurisdiction or application of a statute or regulation, the agency would be loath to act for fear of absolute liability for a good faith mistake. Faced with the choice of having to pay damages for the delay or applying a law or regulation in favor of the developer but contrary to what it may reasonably believe to the legitimate pursuit of regulation, it may choose the former, to the public's detriment. *First English* teaches that unless the agency is acting arbitrarily by failing to advance legitimate state interests, or denies conclusively and absolutely all value to property (*see Dolan v. City of Tigard*, 512 U.S. at 385), it is not temporarily taking property by mistakenly asserting jurisdiction and causing a delay in development until the mistake is corrected by the courts.

There was no taking in this case. The Coastal Commission and the Buckleys pursued the judicial remedies that both were entitled to pursue to obtain a final determination on the propriety of the Coastal Commission's assertion of jurisdiction over the grading on the rear portion of the lot in order to preserve environmentally sensitive habitat. The parties had a legitimate jurisdictional dispute over the pursuit of a legitimate goal under the Coastal Act by the Coastal Commission. The Coastal Commission's good faith legal mistake did not turn into a temporary taking the delay required to settle this dispute through judicial intervention.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The California Court of Appeal,
Second Appellate District, Division Two

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND THE HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE CALIFORNIA BUILDING ASSOCIATION, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AND THE HOME BUILDERS ASOCIATION OF NORTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB"), the California Building Industry Association ("CBIA), the Building Industry Legal Defense ("BILD") Foundation and the Home Builders Association of Northen California ("HBANC") have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUDICIAL REVIEW IN CALIFORNIA CONSISTENT WITH THE LAW LAID DOWN BY THIS COURT IN GENERAL AND, IN PARTICULAR, JUST COMPENSATION WHEN GOVERNMENTAL ACTION HAS DEPRIVED THEM OF ALL VIABLE USE OF THEIR LAND FOR SOME PERIOD OF TIME

The NAHB represents over 195,000 builder and associate members throughout the United States. Its members include people and firms that construct and

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1 No counsel for either party authored any part of this brief. No person or entity other than the NAHB, the CBIA, the BILD Foundation and the HBANC made any monetary contribution to the preparation or submission of this brief.

supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar, governmental action has deprived them of all viable economic use of their land for some period of time.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, - U.S. -, 119 S.Ct. 1624 (1999).

The CBIA is a constituent member of the NAHB with over 5,500 home builders and related businesses who are responsible for over 70% of the homes built in California.

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

Southern California, a constituent member of both the NAHB and the CBIA, whose 1,800 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The HBANC, which is also a constituent member of both the NAHB and the CBIA, has 1,100 members who construct approximately 80% of all new homes in the greater San Francisco Bay area.

The NAHB, the CBIA, the BILD Foundation and the HBANC submit their amici curiae brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether the courts of California are required to follow the law laid down by this Court or whether they are free to go their own way and hold that the commands of the Fifth and Fourteenth Amendments of the federal Constitution do not apply in California.

SUMMARY OF THE ARGUMENT

This Court has spoken on a number of issues concerning judicial review of land use actions in general and of regulatory takings in particular. The courts of California have seen fit to disregard many of this Court's pronouncements.

This Court has held that a claim that regulation has taken land is ripe when the governmental entity imposing the regulation has reached a final decision concerning the

application of the regulation; the courts of California hold that there is no final decision until a court has determined the validity of the regulation.

This Court has held that a per se taking has occurred when regulation deprives the owner of land all viable economic use of that land; the courts of California hold that the legitimacy of the reason for the regulation must be considered.

This Court has held that the ability to use land is a right; the courts of California hold that it is a privilege.

This Court has held that the ownership and use of land is a right protected by the substantive component of the Due Process Clause; the courts of California hold that there is no protected right where a discretionary approval is involved.

This Court has held that a taking of land occurs when governmental action does not substantially advance a legitimate state interest or when it deprives a landowner of viable economic use of his or her land; the courts of California cannot agree on what that means.

This Court has held that the Takings Clause and the Substantive Due Process portion of the Fourteenth Amendment provide alternative bases for reviewing a governmental action; the courts of California hold that all land use decisions must be reviewed under the Takings Clause.

California has walled itself off from the dictates of this Court and the rest of the nation when it comes to land use. Unless this Court grants its writ of certiorari and

reverses the California Court of Appeal's decision in *Buckley v. California Coastal Commission*, 68 Cal.App.4th 178, 80 Cal.Rptr.2d 562 (1998), landowners in California will continue to be deprived of rights recognized by this Court and enjoyed by landowners in every other state.

ARGUMENT

I. THE REGULATORY PROCESS DOES NOT INCLUDE JUDICIAL REVIEW – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.
>
> * * *
>
> "... While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its § 1983 action because those procedures clearly are remedial." *Williamson County, supra*, 473 U.S. at 186 [citations omitted].

B. The Courts Of California

Buckley relied on the California Supreme Court's decision in *Landgate, Inc v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, *cert. denied.*, - U.S. -, 119 S.Ct. 179 (1998), which held that the time during which judicial review was ongoing was part of the "normal processing delay" associated with the land use approval process and therefore is not to be considered in determining if a taking has occurred. *Buckley, supra,* 68 Cal.App.4th at 183, 80 Cal.Rptr.2d at 566. The California Supreme Court did not even refer to *Williamson County* on the question of whether judicial review was part of the regulatory process in its opinion in *Landgate*. Instead, it sidestepped the issue entirely.

> "Nothing in *First English [Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)], however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a landowner must resort to such a determination does not constitute a per se temporary taking." *Landgate, supra,* 17 Cal.4th at 1030, 73 Cal.Rptr.2d at 841, 953 P.2d at 1203 [italics in the original].

II. THE PRESENCE OF A LEGITIMATE GOVERNMENTAL PURPOSE DOES NOT PROTECT A GOVERNMENTAL ENTITY FROM LIABILITY WHEN REGULATION DEPRIVES LAND OF ALL VIABLE ECONOMIC USE FOR SOME PERIOD OF TIME – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

This Court has held that there are situations where governmental action can result in a taking without the application of any balancing test. After discussing the general need for "essentially ad hoc, factual inquiries" to determine when a taking has occurred, this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. ...
>
> > "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (landowner did not take issue with the validity of South Carolina's Beachfront Management Act).

This recognition that the achievement of legitimate governmental interests may require going beyond the use of the police power alone is, of course, no more than a restatement of the general rule that the measure of just compensation is not what the government has gained but

rather what the landowner has lost. *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1909).

B. The Courts Of California

The California Supreme Court completely rejected this Court's holding in *Lucas* and held that the courts of California are to consider the validity of interests to be served:

> "For better or for worse, in a four-to-three decision, the majority held a legally erroneous decision of a governmental agency during the development approval process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question and a legitimate governmental purpose. (*Landgate, Inc. v. California Coastal Commission,* 17 Cal.4th 1006, 1022.)
>
> * * *
>
> "Further, the Supreme Court said that the reality of the application process is that, on occasion, disputes will lead to judicial proceedings. However, so long as such proceedings are not brought on by the arbitrary or capricious acts of the governmental agency, the delay in approval occasioned by judicial proceedings is simply an unfortunate part of the normal process. (17 Cal.4th at pp. 1029-1032.)" *Buckley, supra*, 68 Cal.App.4th at 200, 80 Cal.Rptr.2d at 577 [footnote omitted].

III. THE DEVELOPMENT OF LAND IS A RIGHT, SUBJECT TO REASONABLE REGULATION, AND NOT A PRIVILEGE – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

> "But the right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a 'governmental benefit.'" *Nollan, supra*, 483 U.S. at 833, n.2.

B. The Courts Of California

> "The dedication of land or the payment of fees is a condition precedent to development is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. **Development is a privilege not a right**." *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981)[emphasis added].

Of course, *Trent Meredith* was decided before this Court's decision in *Nollan*; unfortunately, that is irrelevant as far as the courts of California are concerned. See, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 893, 50 Cal.Rptr.2d 242, 268, 911 P.2d 429, 455, *cert. denied*, - U.S. -, 117 S.Ct. 299 (1996), and *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal.App.4th 1358, 1363, 24 Cal.Rptr.2d 48, 51 (1993), both of which spoke of "the privilege of developing property."

IV. THE USE AND ENJOYMENT OF LAND IS A PROPERTY RIGHT PROTECTED BY THE CONSTITUTION – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

This Court has held that land is property within the meaning of the Fifth and Fourteenth Amendments and that the owner of land is entitled to their protection.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)[citation omitted].

Nor is this a new idea.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

B. The Courts Of California

The courts of California disagree; they hold that there can be no property interest protected by the Due Process Clause where there is discretion.

> "Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th

> 1152, 1180, 56 Cal.Rptr.2d 223, 240 (1996), *cert. denied*, 520 U.S. 1176 (1997) (neither procedural nor substantive due process protection is available where a local agency wrongfully denied a discretionary land use approval)[citations omitted].

In as much as the Takings Clause only requires the payment of just compensation when private property is taken for a public use, Californians are forced to ask whether there could ever be a compensable taking, even if all of the other hurdles are overcome, given that virtually every development approval in California is discretionary. See, *e.g., Orinda Association v. Board of Supervisors*, 182 Cal.App.3d 1145, 227 Cal. Rptr. 688 (1986) (demolition permit), *Day v. City of Glendale*, 51 Cal.App.3d 817, 124 Cal.Rptr. 569 (1975)(grading permit) and *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 235 Cal.Rptr. 788 (1987) (building permit).

V. A TAKING OCCURS WHEN GOVERNMENTAL ACTION FAILS TO ADVANCE A LEGITIMATE STATE INTEREST – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court set the standard for determining when land use regulation took land:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state

> interests or denies an owner economically viable use of his land." [Citations omitted.]

The formulation in *Agins* does not stand alone; it has been repeatedly cited by the Court. See, *e.g., Dolan, supra*, 512 U.S. at 386, *Lucas, supra*, 505 U.S. at 1016, *Nollan, supra*, 483 U.S. at 834, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Further, this Court has made it clear that a violation of the first prong of the *Agins* test, standing by itself, can result in a taking of the land affected even though the regulation leaves value in the land. *Dolan, supra*, 512 U.S. at 385 n.6 ("Petitioner assuredly is able to derive some economic use from her property.") [emphasis in the original].

B. The Courts Of California

> "There are several problems with [the landowner's] attempt to show that, as a matter of law, a taking of property occurred here. First, we cannot accept [the landowner's] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas*, and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably linked both the regulation's validity and the question of whether an economically beneficial use of the property remained in light of the regulation.

In light of later authority, *Agins* did not establish an 'either/or' type of test." *Del Oro Hills v. City of Oceanside*, 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677, 690 (1995).3

VI. JUST COMPENSATION MUST BE PAID WHEN A REGULATION TAKES LAND FOR THE TIME THAT THE REGULATION REMAINS IN EFFECT – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

"We merely hold that where the government's actions have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

This Court recognized that the result would be to limit the flexibility of local governments and to impose costs on local government which, in California, they had not had to bear before.

"We realize that even our present holding will undoubtedly lessen to some extent the freedom and

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3 In fairness to the courts of California, it should be noted that another court of appeal, in *152 Valparaiso Associates v. City of Cotati*, 56 Cal.App.4th 378, 385-386, 65 Cal.Rptr.2d 551, 555-556 (1997), disagreed with the statement in *Del Oro Hills*.

> flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English, supra*, at 321.

B. The Courts Of California

The Buckley case before this Court is only the latest statement of the California courts that they do not intend to be bound by this Court's decision in *First English*. For example, in *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), *cert. denied*, - U.S. -, 118 S.Ct. 856 (1998), the California Supreme Court dealt with a case where the court of appeal had earlier held that the landlord's constitutional right had been violated, a holding that the California Supreme Court felt itself bound by. *Kavanau, supra*, 16 Cal.4th at 777-779, 66 Cal.Rptr.2d at 682, 941 P.2d at 861. The California Supreme Court went on to hold that the landlord was not entitled to damages; the only remedy that he was entitled to was the opportunity to charge higher rents in the future even though he would have to charge higher than market rents to make up for what he had lost. *Kavanau, supra*, 16 Cal.4th at 785, 66 Cal.Rptr.2d at 687, 941 P.2d at 866.

Quite simply, the California Supreme Court's decisions are guided by a world view substantially

different from that expressed by this Court in *First English.*

> "The disparity in resources between the federal government and local governmental entities both explains and justifies the state procedure. The likelihood that the impact of a federal regulatory statute may effect a taking of property of such value as to threaten the federal treasury with insolvency is remote. Congress has determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship. Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property." *Hensler v. City of Glendale,* 8 Cal.4th 1, 18-19, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994), *cert. denied,* 513 U.S. 1184 (1995)[footnote omitted].

This is, of course, a reprise of what the California Supreme Court said almost 20 years ago in *Agins v. City of Tiburon,* 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), aff'd on other grounds, 447 U.S. 255 (1980). In *Agins,* the California Supreme Court, after quoting from a number of law review articles listing a parade of horribles which would result if a court were ever to hold that a land use regulation which went too far could result in inverse condemnation and the payment of just compensation, concluded:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which

adheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Agins, supra*, 24 Cal.3d at 276-277, 157 Cal.Rptr. at 378, 598 P.2d at 31.

VII. THE TAKINGS CLAUSE AND THE SUBSTANTIVE DUE PROCESS CLAUSE PROVIDE ALTERNATIVE BASES OF LIABILITY – EXCEPT IN CALIFORNIA

A. The United States Supreme Court

"Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." *Soldal v. Cook County*, 506 U.S. 56,70 (1992).

Thus, this Court has frequently evaluated the validity of governmental action under both the Takings and the Substantive Due Process Clauses. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connelly v. Pension Guarantee Corp.*, 475 U.S. 211 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); and *Pension Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). See also *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where four

justices evaluated legislation under the Takings Clause and five justices evaluated it under the Substantive Due Process Clause.

B. The Courts Of California

> "[T]he taking provision of the Fifth Amendment to the United States Constitution preempt [the landowner's] substantive due process claim." *Ventura County Flood Control District v. Campbell*, 71 Cal.App.4th 211, 223, 83 Cal.Rptr.2d 725, 732 (1999).

VIII. CONCLUSION

Mrs. Buckley has pointed out the views that a number of respected commentators hold on the role – more precisely, the absence of any role – that the courts of California play in overseeing the land use approval process. (Petition at 6-11.) Taken as a whole, they stand for the proposition that the courts of California have totally abdicated their role of supervising the actions of government in the land use approval process. Seldom do they find that governmental regulation of land use has gone too far and **never** do they reimburse the landowner for the injuries suffered. This is simply unsupportable at a time when California's housing needs are at an all time high and when NIMBYism ("Not In My Back Yard") is becoming more and more prevalent.[4]

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4 Ventura County had the slowest rate of growth of any of the seven counties in Southern California because of the growth control initiatives adopted in both the County and in all of its major cities over the last several years. Los Angeles Times, Part B at 16, Ventura

The treatment that Mrs. Buckley received at the hands of the California Court of Appeal, after remand from the California Supreme Court, is, unfortunately, not untypical and it is almost certain to continue unless, and until, this Court makes it clear that it meant what it had said in previous cases:

- The ownership of land means that the landowner has a property right, protected by the Fifth and Fourteenth Amendments to the federal Constitution, to use that land subject, of course, to reasonable regulation.

- When a landowner is deprived of all viable economic use of his or her land for some period of time, the federal Constitution mandates the payment of just compensation for that period.

- The question is not whether the local government meant to sterilize the land for some period of time but whether it actually did so; there is no good-hearted, empty-headed defense (local government's plea that it didn't mean to do it, that it was all a mistake).

County Edition (May 9, 1999). Four cities in the San Francisco Bay area have growth control initiatives on the ballot in November which will require voter approval for every project with more than 10 units in three of the cities and more than 20 in the fourth. San Francisco Chronicle, Part A at 13, Contra Costa Edition (May 31, 1999). The fact that these measures are being enacted by the people directly does not insulate them from judicial review (except, of course, in California). *City of Cleburne v. Cleburne living Center*, 473 U.S. 432, 448 (1985).

- Land use regulation must be analyzed for validity under both the Takings Clause and the Substantive Due Process Clause.

- In short, the Fifth and Fourteenth Amendments to the federal Constitution protect landowners even when their land is located in California.

The courts of California hold that there can be no invalid governmental action in the context of the land use approval process unless it shocks the judicial conscience. *Ventura County Flood Control District, supra,* 71 Cal.App.4th at 223, 83 Cal.Rptr.2d at 732. They have it wrong; it is the failure of those courts to follow the clear mandates of this Court which should shock the judicial conscience.

Article VI, § 2, of the federal Constitution has meant what is says – the federal Constitution is the supreme law of the land and judges in every state are bound by it – for over 180 years. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Nevertheless, it is sometimes necessary for this Court to remind the judges of the lower courts of their obligation to follow the law as laid down by this Court. *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

The NAHB, the CBIA, the BILD Foundation and the HBANC respectfully request that this Court grant Mrs. Buckley's petition for writ of certiorari.

DATED: June 23, 1999

Respectfully submitted,

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No. 98-1894

In the

Supreme Court of the United States

PEGGY ANN BUCKLEY,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Second District

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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26pp

QUESTIONS PRESENTED

1. (a) May a state court rule, contrary to this Court's holdings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that landowners who are prevented from improving and using their land for a family home by invalid and unconstitutional land use regulations—found by the court to be invalidly imposed by a government agency *acting without jurisdiction*—may be denied Fifth Amendment just compensation for the resulting regulatory taking of their land?

(b) May a state court rule that the supposed "remedy" of landowners subjected to jurisdictionally invalid and unconstitutional regulations is to knuckle under to the unlawful government demands and forego lawful use of their land on pain of losing their right to seek just compensation in court?

2. May a state court rule, contrary to this Court's holdings in *First English*, *Lucas*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that unconstitutional land use regulations that deny landowners all economically beneficial use of their land for many years do not justify Fifth Amendment compensation for a taking if the regulators (who lack jurisdiction to act) can come up with some arguable—albeit invalid—basis for their action?

3. May a state court nullify this Court's holding in *First English* (that the Fifth amendment compels compensation for the period of time *before* a confiscatory regulation is struck down), by ruling that no compensation can ever be constitutionally due until *after* a court invalidates the regulation?

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Arthur Conan Doyle, *Silver Blaze, The Complete Sherlock Holmes* (1930) 18

INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the Respondent California Coastal Commission. For example attorneys with Pacific Legal Foundation represented Marilyn and Patrick Nollan in their battle with the Coastal Commission over its demand that the Nollan's dedicate a portion of their beachfront property in exchange for a permit necessary to build their family home. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Its attorneys have also represented numerous other individuals over the years in their disputes with the California Coastal Commission, including cases that have made significant contributions to the law of regulatory takings in California. *See, e.g., Lechuza Villas West v. California Coastal Commission*, 60 Cal. App. 4th 218 (1997), *cert. denied*, 119 S. Ct. 163 (1998) (representing landowner seeking review of decision allowing state to redefine definition of property); *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158 (1994) (representing landowner seeking just compensation); *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006, 953 P.2d 1188, *cert. denied*, 119 S. Ct. 179 (1998) (amicus support of landowner seeking just compensation for temporary taking).

Attorneys for Pacific Legal Foundation have also represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see Suitum v. Tahoe Regional*

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and Defenders of Property Rights affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Planning Agency, 520 U.S. 725, 117 S. Ct. 1659 (1997), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Finally, Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which the California courts denied a property owner relief for a regulatory taking.

Because of the Foundation's experience both with the California Coastal Commission and Takings Clause litigation in the California courts, it has a unique perspective on the state of the doctrine of regulatory takings in the State of California. Because of its experience, the Foundation can contribute a unique perspective to this Court as it determines whether to grant Peggy Ann Buckley's petition for writ of certiorari.

Defenders of Property Rights is a nonprofit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote a better understanding of the relationship among all the rights protected under the Bill of Rights. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Del Monte Dunes v. City of Monterey*, No. 97-1235 (May 24, 1999), *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725; *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003.

Pursuant to Supreme Court Rule 37, written permission from all parties for PLF and Defenders of Property Rights to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

In 1976, the State of California adopted the California Coastal Act which established the California Coastal Commission and vested in that agency the power to regulate development along the California coast. The agency took its power seriously—so seriously, in fact, that the Legislature felt compelled, in 1979, to create an exemption for residential home construction in established residential neighborhoods wherein the counties, not the Coastal Commission, would have regulatory jurisdiction.

In 1988, Peggy and John Buckley purchased an inland 2.75-acre lot in Malibu for which they paid $485,000 and invested $200,000 to $300,000 in utilities and upgrades. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th 178, 183-84 (1998). The lot is located in a developed residential neighborhood and, as such, is statutorily exempt from the jurisdiction of the California Coastal Commission. *Id.* at 190. The Buckleys' plan was to obtain the permits necessary to prepare the lot for the construction of a single-family home. *Id.* at 183. Although the Buckleys received certification from the county that their entire lot was exempt from Coastal Commission jurisdiction, the Coastal Commission claimed that the lower two thirds of their lot was an environmentally sensitive area and therefore still subject to its jurisdiction. *Id.* at 185.

After receiving grading and building permits from the County of Los Angeles for a single-family home in 1989, the Buckleys commenced grading. *Id.* at 185-86. The Commission issued a stop work order, threatening a $10,000 fine plus additional fines of $5,000 for every day that work continued. Appellant's Appendix at 68. In November of 1991, a landslide began to develop and the County Department of Public Works ordered the Buckleys to repair the landslide. 68 Cal. App. 4th at 185-86. Shortly after work commenced, the Commission issued another stop work order. Thus proventing the Buckleys from repairing the landslide. *Id.* at 186.

The Buckleys filed an action for declaratory relief and the Commission sought an injunction and fines. The Buckleys cross-complained for takings damages. The trial court found that the Commission had no jurisdiction over any part of the lot. It also awarded $1.3 million for a permanent taking and $831,494 in attorneys' fees and costs. *Id.* at 187.

On appeal, the court of appeal affirmed that the Coastal Commission had no jurisdiction over any portion of the lot. *Id.* at 189-90. But the court also found that there was no takings liability. *Id.* at 201. The court found that the Buckleys should have applied to the Commission (which lacked jurisdiction) for a scaled-back grading permit on the lower part of the lot that would have allowed potential development of the front part. *Id.* at 196. As for the fact that the Commission had no jurisdiction on any portion of the lot, the court found that *Landgate v. California Coastal Commission* precluded any liability:

> For better or for worse . . . the majority held that a legally erroneous decision of a governmental agency during the development process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question *and a legitimate governmental purpose.*

68 Cal. App. 4th at 200. In other words, even though the Commission had no jurisdiction to grant or deny any grading or other development permit on any portion of the Buckleys' lot, the Commission could not be held liable for a taking so long as there is a "legitimate purpose" to the illegitimate regulation. After the California Supreme Court denied review, Peggy Ann Buckley petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

SUMMARY AND INTRODUCTION

California is not a good place to own property that is coveted by a public agency. If a proposed use of the property is inconsistent with an agency's desires for the property, the landowner will not be able to use the land as the owner might wish. If an agency unlawfully asserts jurisdiction over the property and prevents it from being used, the landowner's only recourse is to employ attorneys to file a writ of mandate to get the regulation overturned. But no matter how long an agency unlawfully usurps the use of real property, the agency need not worry about Takings Clause liability, temporary or otherwise. In California, so long as the agency's motives are said to be pure, the agency is immune from takings liability. The law of regulatory takings as elucidated by this Court and followed by many other jurisdictions simply does not apply in California. As California Supreme Court Justice Janice Brown recently put it:

> When the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." In these limited circumstances, government must turn square corners—except in California.

Landgate v. California Coastal Commission, 17 Cal. 4th at 1043, 953 P.2d at 1212 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)) (Brown, J., dissenting).

I

THE CALIFORNIA SUPREME COURT HAS FORECLOSED THE JUST COMPENSATION REMEDY REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. *First English* Overruled the Former California Supreme Court Rule Precluding Compensation for Regulatory Takings

In 1979, the California Supreme Court proclaimed in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), that a just compensation remedy was unavailable in that state for regulatory takings:

> [A] landowner alleging [a regulatory taking] may attempt through declaratory relief or mandamus to *invalidate the ordinance* as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. *He may not, however, elect to sue in inverse condemnation [i.e., seek just compensation]* and thereby transmute an excessive use of the police power into a lawful taking *for which compensation . . . must be paid.*
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> . . . .
>
> In combination, the need for preserving a degree of freedom in the land-use planning function, and the *inhibiting financial force which inheres in the inverse condemnation remedy*, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation [*i.e.*, just compensation] is the appropriate relief under the circumstances.

Agins, 24 Cal. 3d at 273, 276-77, 598 P.2d at 28, 30-31 (emphasis added). Owners whose property was confiscated by

excessive regulation were limited to a *due process remedy* of invalidation of the offending statute or regulation.

This Court directly confronted and overruled *Agins* in *First English*. Squarely rejecting the California Supreme Court rule that takings claimants could be limited to a due process remedy, this Court stated:

> [G]overnment action that works a taking of property rights necessarily implicates the *constitutional obligation* to pay just compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 315 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (emphasis added). Accordingly, the California Supreme Court doctrine espoused in *Agins* was overruled as "inconsistent[] with the requirements of the Fifth Amendment." *First English*, 482 U.S. at 311. But as will be shown, according to at least two California Supreme Court justices, "[t]he more things change, the more they remain the same." *Landgate*, 17 Cal. 4th at 1035, 953 P.2d at 1206 (Brown, J. dissenting (joined by Baxter, J.)).

B. The California Coastal Commission Has Not Embraced the Doctrine of Regulatory Takings

California's government agencies have resisted *First English* and the doctrine of regulatory takings. This is especially true of the California Coastal Commission. Peter Douglas, the Commission's long time executive director, rejects this Court's takings jurisprudence. He calls it

> unfortunate, especially when you consider we live on limited space and are a society with collective needs. The land was here long before we were.

L.A. Times, Mar. 2, 1998, at A9. Harking back to the California Supreme Court's rationale in *Agins* of an "inhibiting financial force" he claims:

> The recent rulings on "takings" issues have, directly and indirectly, stripped the public sector of important tools needed to effectively manage development of private land.

Peter Douglas, speech to the California Chapter of the American Planning Institute, Oct. 13, 1997, at 9 (visited Jun. 14, 1999) http://www.rain-org/calepa/peterdouglas.html. To regain the tool of uncompensated regulatory takings, the Commission has done everything in its power, with much success, to convince the California courts to disregard this Court's precedents in property rights. It has attacked the advocacy of such doctrines as

> something extremely corrosive [that] has been injected into our social being and the body politic that has eroded our appreciation of the collective well-being.

Id. at 5-6. The Commission is contemptuous of this Court's recent takings decisions, for example suggesting in a discussion of *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, that

> there is no legal formula or doctrine that compels this result. Rather it is predicated on the subjective judgment, the value choices and the philosophical perspective of the judge or judges rendering the decision.

Douglas at 8.[2] The California courts have been only too happy to accommodate the state government's disdain for the Just Compensation Clause.

C. In Response to *First English*, the California Supreme Court Required Regulatory Takings Claimants to First Seek a Due Process Remedy of Invalidating the Offending Regulation via Mandamus or Declaratory Relief

In response to *First English*, the California Supreme Court created a stringent new procedural rule which has the effect of limiting claims for regulatory takings. Under the California rule of *Hensler v. City of Glendale*, 8 Cal. 4th 1, 21-28, 876 P.2d 1043, 1056-60 (1994), as-applied regulatory takings claims must proceed by way of administrative mandamus and facial regulatory takings claims must proceed by way of an action for declaratory relief. *Id.* Only if a takings claimant seeks to have the offending regulation invalidated via mandamus or declaratory relief may he then seek compensation through an inverse condemnation proceeding. *Id.*, 8 Cal. 4th at 14, 876 P.2d at 1051-52. What makes this procedural requirement unique is not only its doctrinal unsoundness,[3] but also that it

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[2] Douglas' alternative solution is reflected in his statement that unless

> [we] amend our national constitution to give Americans a constitutional right to a high "quality" of life (as in the case in India) . . . it is the courts that will be the arbiters of the debate over property rights.

Id. at 6.

[3] Outside of California, it has *never* been the law that only invalid statutes or government actions trigger liability under the Just Compensation Clause. As one commentator has stated:

> The *Hensler* opinion was [unclear] on why injured property owners should be forced to seek an invalidation remedy--the only relief provided under the

(continued...)

effectively requires plaintiffs to pursue a *due process claim* as a *prerequisite* to seeking just compensation for a regulatory taking.

Thus, in effect, the initial response of the California Supreme Court to *First English* was to establish that regulatory takings plaintiffs must first pursue a due process action before compensation under the Just Compensation Clause will even be considered. Compensation was no longer expressly foreclosed, as under *Agins*, but was reduced to a follow-on *possibility* for plaintiffs who succeeded in their claim for a due process remedy of invalidation.

D. The Recent California Supreme Court *Kavanau* Case Totally Eliminates the Just Compensation Remedy for Most Regulatory Takings Claims

In *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 941 P.2d 851 (1997), *cert. denied*, 118 S. Ct. 856 (1998), the plaintiff complied to the letter with California's rigorous procedural demands. His administrative mandamus petition was filed within 90 days of the rent board's confiscatory actions and, remarkably, Mr. Kavanau obtained a judgment from the California appeals court finding that the rent board's regulations were unconstitutionally confiscatory as applied to him. *Id.*, 14 Cal. 4th at 768, 941 P.2d at 855.

Mr. Kavanau then filed a timely complaint in inverse condemnation seeking compensation for the period during which the rent board had wrongfully deprived him of a fair return. The

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[3](...continued)

> cited code sections--when *legitimacy* of the regulation may be conceded by the owner from the outset. . . . Until now, it has not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions.

Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepperdine L. Rev. 99, 125 (1994).

trial and a divided appellate court found no taking can occur if the owner retains any use of the property.

On appeal the California Supreme Court, faced with the prospect of actually having to subject an entity of California government to the discipline of the Just Compensation Clause—as required by *First English*—avoided doing so. Rather, the California high court determined that a due process remedy was not only a prerequisite to (as expressed in *Hensler*), but a *substitute* for, just compensation. According to the reasoning of the court, because Mr. Kavanau could return to the rent board and go through the petitioning process anew (to seek rent increases), this in and of itself was an adequate remedy. As the court stated: [A] remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*. *Kavanau*, 16 Cal. 4th at 782, 941 P.2d at 865 (emphasis added).

By upholding the dismissal of Mr. Kavanau's inverse condemnation complaint, the California Supreme Court's decision cannot be reconciled with this Court's teaching in *First English*:

> [A] landowner is entitled to bring an action in inverse condemnation as a result of the "self-executing character of the constitutional provision [*i.e.*, the Fifth Amendment] with respect to compensation."

First English, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253 (1980)).

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation (*Hensler*, 8 Cal. 4th at 7, 876 P.2d at 1047), and because under *Kavanau* every due process violation with a so-called "available and adequate" due process remedy obviates the finding of a taking and therefore the payment of just compensation, the California

Supreme Court has foreclosed compensation in nearly every case.[4]

In other words, notwithstanding this Court's decision in *First English* overruling the California Supreme Court's *Agins* opinion, the California Supreme Court has in fact *revived* the *Agins* rule: just compensation is *not* available in the California courts *as a matter of law*, so long as an invalidation remedy is available.

E. Even in "Per Se" Takings Cases, California Case Law Precludes the Compensation Remedy

It is a long-settled principle of law that a regulation or ordinance effects a taking if the ordinance either (1) does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. at 260. The first prong focuses on the nature of the regulation at issue to determine whether the application of the regulation to the proposed use of the property substantially advances a legitimate governmental interest. The second prong focuses on the regulation's effect on the property at issue to determine to what extent the regulation eliminates economically viable use of the property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this Court made clear that if a regulation operates to deny a landowner all economically beneficial or productive use of his land, a per se taking has occurred and therefore just compensation must be paid under the rule of *First English*.

Nevertheless, when the California Supreme Court was recently confronted with exactly such a "per se" regulatory

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[4] In *Kavanau* the "remedy" was the right to apply to the rent control board for higher rents from tenants in the future. This is a poor substitute for just compensation. The only exception (in theory) would be where the government persists in the application of its regulations after a court pronounced them to be invalid.

taking, that court once again confirmed that just compensation was not an available remedy in that state. In *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006, 853 P.2d 1188, the Coastal Commission reached a final decision[5] with respect to the property at issue which had the effect of denying the property owner all beneficial use of his residential lot. *Landgate*, 17 Cal. 4th at 1013-15, 953 P.2d at 1191-93. Approximately two years later, this decision was overturned by a trial court thereby allowing the plaintiff to build on the lot. When the owner sought compensation pursuant to *First English* and *Lucas*, for the two-year period during which the Coastal Commission deprived him of all beneficial use of his property, the trial court awarded him $156,000 for the temporary taking. *Landgate*, 17 Cal. 4th at 1015, 953 P.2d at 1193 at 1015. However, the California Supreme Court set aside this judgment ruling that Landgate's *sole remedy was invalidation of the Coastal Commission's initial ruling*. *Id.*, 17 Cal. 4th at 1021, 953 P.2d at 1197. In other words, under *Landgate*, if a regulatory agency illegally or erroneously precludes a property owner from making *any beneficial use* of his or her property for a period of time—be it one, two, or ten years—the *landowner may not recover compensation for this temporary taking as a matter of law in California*.

The fact that the *Landgate* decision effectively resuscitates the former California rule of *Agins*—which provided for an invalidation remedy only and not a compensation remedy for

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[5] One of the ripeness requirements of a takings claim is that a property owner receive a "final decision" with respect to what exact use will be permitted of his land. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Landgate received such a final decision: "At its February 1991 meeting the Commission denied Landgate's application." *Landgate*, 17 Cal. 4th at 1013, 953 P.2d at 1191; *see also* 17 Cal. 4th at 1033, 953 P.2d at 1205 (Chin, J., dissenting) ("[T]he Commission flatly denied the permit, and its decision was final in every sense. The Commission was not planning to take any further action.").

takings claimants—is made all too clear by comparing the practical effect of the *Landgate* decision with the *First English* opinion. In sum, under *First English*, once a regulatory action is administratively final, and where that regulation's impact is to prevent all economically productive use of the land at issue, compensation is *constitutionally compelled* for the period during the litigation that determines the validity of the regulation at issue. *First English*, 482 U.S. at 306-07. In the words of this Court:

> In this case [*i.e.*, the California court decision overruled by] the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a "taking" of his property*. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.
>
> . . . .
>
> While the California Supreme Court may not have actually disavowed this general rule . . . , we believe that it has truncated the rule *by disallowing damages [i.e., compensation] that occurred prior to the ultimate invalidation of the challenged regulation.*

First English, 482 U.S. at 306-07, 317 (emphasis added).

Although *Landgate* certainly does not state directly that the compensation remedy is precluded, it disavows the rule of *First English* and precludes compensation all the same. By holding that an aggrieved property owner must first sue to invalidate even a valid regulation, and that such litigation over the regulation is a "normal delay" in California's planning process which cannot— regardless of the illegality of the regulation or its effect on the property at issue—result in a taking requiring the

payment of just compensation, California law has in fact retained the *Agins* rule.

The *Buckley* opinion offers further unambiguous authority that California law precludes a compensation remedy. As described, the facts of *Buckley* are closely akin to those in *Landgate*. For over a two-year period from August, 1989, to December, 1991, the Coastal Commission precluded the owners from making *any beneficial use* of the lot at issue. *Buckley*, 68 Cal. App. 4th at 183-87. The lower courts found that the Coastal Commission had no jurisdiction over the lot. The only way the Buckleys could have developed their property would have been to submit to the unlawful jurisdiction of the California Coastal Commission. The assertion of nonexistent jurisdiction failed to advance any *legitimate* governmental interest—and, as such, was a per se taking.

Yet, the court of appeal reversed the damage award for the taking. While conceding that "[t]emporary takings which deny a landowner all use of property are not different in kind from permanent takings, for which compensation is clearly required" [citing *First English*], the court nevertheless was compelled "for better or for worse" to apply *Landgate*. *Buckley*, 68 Cal. App. 4th at 193-94, 200. In the words of the court:

> Finally, the recent decision of our Supreme Court in *Landgate precludes any monetary recovery* by the Buckleys. Boiled down to its essence, *Landgate* held that, under the facts presented, an incorrect decision of the Commission in asserting jurisdiction over property did not constitute a temporary taking [and therefore precludes compensation].

Id. at 199 (emphasis added, citations omitted).

In other words, pursuant to *Landgate* and *Buckley*, under California law, an aggrieved property owner who has suffered a temporary taking is *precluded from recovering compensation as a matter of law*: the only remedy is invalidation of the regu-

lation or government decision at issue. Together, both the *Landgate* and *Buckley* decisions illustrate the evaporation of the compensation remedy in the California courts by virtue of an interpretive slight of hand.[6]

The *Landgate*, *Buckley*, and *Kavanau* decisions together demonstrate the settled policy of the California courts to foreclose a remedy of just compensation in virtually every instance. As Justices Brown and Baxter have noted:

> When the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." In these limited circumstances, government must turn square corners—*except in California*.

Landgate, 17 Cal. 4th at 1043, 953 P.2d at 1212 (Brown, J., dissenting) (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393) (emphasis added)).

Because under California law every takings claimant is required to obtain a due process remedy as a prerequisite to pursuing inverse condemnation, and because under *Kavanau* every due process violation with a due process remedy obviates the finding of a taking and therefore the payment of just compensation (even in the context of "per se" takings, as *Landgate* demonstrates), the California Supreme Court continues to foreclose the compensation remedy. As a practical matter, *the discredited and overturned rule of Agins remains the law in California.*

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[6] The lower court's suggestion that the Buckleys might have applied for another permit does not invoke the question of ripeness under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985), because that case did not involve an *invalid* assertion of permitting authority.

The recent case *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1998), 968 P.2d 993, *cert. denied* (May 26, 1999), is further illustrative of the California Supreme Court's continued foreclosure of a compensation remedy in resolving takings claims. In that case, the court precluded the plaintiff from attempting to prove at trial that a city's rent control law did not substantially further the stated purpose of the law (which was to expand the range of affordable rental housing). In so holding, the court applied a *due process* standard. *Santa Monica Beach*, 19 Cal. 4th at 964-68, 972, 968 P.2d at 1000-03; *see also* Dissenting Opinion by Justice Chin, 19 Cal. 4th at 1018, 968 P.2d at 1035 ("The majority . . . inappropriately conflates takings jurisprudence with due process jurisprudence"); Dissenting Opinion by Justice Baxter, 19 Cal. 4th at 985, 968 P.2d at 993 ("[T]he majority address the wrong question and give the wrong answer. The takings clause has different and more stringent criteria than those applied under the majority's attempt to morph the deferential due process rational basis test into a takings clause test."). In short, *Santa Monica Beach* is yet another manifestation of the California Supreme Court improperly forcing a takings claim into a due process analysis capable of producing (at best) only a due process remedy. Again, because the California Supreme Court has opined that a remedy for a due process violation "obviates a finding for a taking" (*Kavanau*, 16 Cal. 4th at 782, 941 P.2d at 866), takings claimants are precluded *as a matter of law* from obtaining a just compensation remedy. (But, in the Ninth Circuit, a takings claim precludes a due process claim. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1986)).

F. There Exists Not One Single Reported California Decision Awarding Just Compensation for a Regulatory Taking Since *First English*

As further evidence that the California courts have a settled policy of precluding a compensation remedy for takings claimants, a search of reported California appellate decisions

since 1987 demonstrates that not one single reported California decision awarding just compensation for a regulatory taking exists. This lack of reported cases, "like Sherlock Holmes's 'dog in the night-time' which tellingly failed to bark," Arthur Conan Doyle, *Silver Blaze, The Complete Sherlock Holmes* 335 (1930), is evidence itself of the California Supreme Court's settled policy of precluding compensation for regulatory takings claimants.

This fact is indicative of the problem to which this Court should direct its attention. Namely, because *California courts do not provide just compensation to aggrieved property owners who have had their property confiscated through regulatory actions*, the courts of that state do not provide adequate protection of federal constitutional rights guaranteed by the Just Compensation Clause.

G. If the Buckleys' Property Were Located Outside of California, They Would Have Fared Better Because Other Jurisdictions Are in Conflict with California and Recognize that Unlawful Permit Denials Can Lead to Takings

The Buckleys would be better off if they had owned their property in another state. For example, in *Cumberland Farms v. Town of Groton*, 719 A.2d 465 (Conn. 1998), the Town of Groton denied a permit to an owner of a gasoline station who desired to make improvements and build a minimart. The owner filed two lawsuits, seeking Takings Clause damages in one suit and challenging the denial of the permit in a second suit. In direct contrast to the California *Landgate* and *Buckley* decisions, the Connecticut Supreme Court held that the taking claim was ripe, noting that even if the owner prevailed on the second lawsuit and had the permit denial overturned, he still would have a ripe claim for a temporary taking. *Id.* at 472-73.

In *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994), the Alaska Supreme Court found that while a "compensable temporary taking . . . would result if an ordinance were held

invalid," *id.* at 801 n.8, there was no "per se" temporary taking when an arbitrary permit denial did not destroy all economically viable use. *Id.* at 801. The case was remanded for "balancing" under *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In California, of course, the case would not have been remanded under these circumstances because the owner must first seek invalidation. Upon obtaining invalidation of the ordinance, no takings compensation would be possible—either under a total temporary denial of economically viable use (*Landgate*), or a lesser economic impact leading to a "balancing" inquiry (*Cannone*).

In *Yuba Natural Resources, Inc. v. United States*, 821 F.2d, 638, 641-42 (Fed. Cir. 1987), the Federal Circuit held that there was a temporary taking when the United States unlawfully denied a mining permit for six years during which time it claimed to own the minerals. The Eleventh Circuit has similarly been receptive to the concept of temporary takings. *See, e.g., Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270-71 (11th Cir. 1987).

There is only one state that has been close to adopting California's jaundiced view of temporary takings. In *Woodbury Place Partners v. Woodbury*, 492 N.W.2d 258, 262 (Minn. App. 1992), an appellate court found in a curious decision that, based on Justice Stevens' dissent in *First English*, a regulation that denied all use of property for two years was not a taking because such a finding would otherwise impermissibly segment property.

The conflict between Connecticut, Alaska, the Federal Circuit, and the Eleventh Circuit with California (and an appellate court in Minnesota) is evident.[7]

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[7] There is also a conflict between the California Supreme Court and the Ninth Circuit, as the latter has not substituted due process standards for a takings analysis. In *Richardson v. City and County of Honolulu*, 124 F. 3d 1150 (9th Cir. 1997), the court applied *Nollan v.*

(continued...)

CONCLUSION

If for no other reason than to bring California back in line with the rest of the nation, Peggy Ann Buckley's petition for writ of certiorari should be granted.

DATED: June, 1999.

Respectfully submitted,

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[7](...continued)
California Coastal Commission, 483 U.S. 825, and held that rent control regulations must substantially further a legitimate governmental interest. *Richardson*, 124 F.3d at 1165. In so holding, the court recognized--contrary to the California courts' jurisprudence--that takings claims must be resolved under the Just Compensation Clause and not under the Due Process Clause. *Id.* Other courts are in accord with the Ninth Circuit's reasoning in *Richardson*. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059 (NY 1989) (applying the "substantial advancement" takings analysis enunciated in *Nollan* to overturn restrictions against converting single-room occupancy hotel rooms).

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No. 98-1894

In The

Supreme Court of the United States

PEGGY ANN BUCKLEY,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District, Division Two

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state court deny a landowner the right to compensation, in violation of the Fifth Amendment and contrary to this Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), for the period of time during which a legal challenge is made to a governmental assertion of authority which is ultimately determined to be an invalid action because it is beyond the jurisdiction of the government agency?

BRIEF, *AMICUS CURIAE*, OF CALIFORNIA ASSOCIATION OF REALTORS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the California Association of REALTORS® (hereafter C.A.R.) submits this brief in support of the Petition for Writ of Certiorari.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

C.A.R. is a voluntary trade association representing the interests of approximately 95,000 persons licensed as real estate brokers and salespersons by the State of California. C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and the protection of private property rights. C.A.R. pursues its objectives through a variety of methods, including education of its members, creation of standard form agreements for use in real estate transactions, advocating positions to legislative bodies, providing legal advice to members and participation as *amicus curiae* in relevant court cases.

C.A.R. members believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

unduly diminished or jeopardized by governmental action without just compensation.

Unfortunately, due to the oftentimes hostile position that California agencies and courts have taken with regard to property rights, C.A.R. is not a novice as an *amicus* in governmental takings litigation, particularly involving the Coastal Commission, as evidenced by the continual parade of California takings issues before the United States Supreme Court. C.A.R. has participated as an *amicus* before numerous courts including this one in the seminal cases of *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and most recently in *City of Monterey v. Del Monte Dunes*, 95 F.3d 1422 (1999). The current state of affairs in California again makes it necessary for C.A.R. to take a role as *amicus*.

THE PETITION FOR WRIT OF CERTIORI SHOULD BE GRANTED AS THE FEDERAL CONSTITUTIONAL RIGHT REGARDING THE TEMPORARY TAKING OF PROPERTY WITHOUT JUST COMPENSATION CANNOT BE ABROGATED BY CALIFORNIA AGENCIES AND CALIFORNIA COURTS.

If the *Buckley* case is allowed to stand, property owners will be forced to choose between two losing propositions. The owner could cede to the unreasonable and illegal demands of an overzealous agency or the owner could challenge the government regulation knowing that, unlike property owners in other states, success of such challenge comes at a high price. The price in California is the inability to receive damages for the unlawful taking

during the course of the legal challenge. Why? Because the California Supreme Court has ruled that the period of time during which a governmental regulation is judicially challenged is nothing more than a normal, expected, administrative delay in the process and not a taking worthy of just compensation. *Landgate, Inc. v. California Coastal Commission* (1998), 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841. Simply put, a legal challenge would preclude a court from awarding damages during the temporary taking. This is true even if during the challenge period the property owner is deprived of all economically viable use of its property. A philosophy that there is no deprivation, even temporarily, of a series of outrageous and arrogant acts by a California governmental agency until it is fully litigated, presumably even to this Court, makes it impossible for California property owners to ever be made whole. The United States Constitution protects California property owners from such results, even though the California Courts have refused to recognize these protections, which now requires, once again, this Court to step in to enforce these core rights.

The local city, county, Coastal Commission and any other government authority can make decisions to delay, obstruct or ultimately wear down property owners who neither have the means nor the economic staying power to challenge the current holders of the land use regulatory kingdom. If the decision crosses the line into the confiscatory, then the local government's only penalty is to undo the decision, not any damages for the undue delay or inability to use the land. It is a free leasehold for open space, or freeze on use for the interim, actually giving incentives for delay when there is a weak position

taken by the government. For those seeking to deter development of any kind, this is still a win as it gives increased leverage to those ruling the land use empire to extract more during the fight. Those wishing to use their purchased bundle of not only dirt but the rights we call property are left with no remedy for the delay and deprivation of use, only extensive legal fees for the privilege of enforcing such rights. The frequency of this abuse is altogether too obvious by the history of cases that continue to populate California jurisprudence.

C.A.R. is not so naïve as to think that enforcing constitutional rights is inexpensive or expeditious but at some point, the leverage is so shifted as to exacerbate the right, especially when there is little if any downside to the offending party. Such dynamics are more often in the business litigation world in which business risks are calculated in a civil justice arena with a relatively even playing field, without constitutional dimension. When one party has unilateral power to control the rules, only the United States Constitution can serve as a buffer to protect against those abuses of government that tread on rights central to the United States' private property system and freedom. This case presents such a situation.

California Appellate and California Supreme Court decisions are inconsistent with the rules articulated in this Court and undermine U.S. Supreme Court authority. Not only are California property owners forced into a no-win situation, California jurists are also forced into the judicially awkward position of answering to two masters. California trial and appellate courts have been forced to choose between sound U.S. Supreme Court authority and

seemingly irreconcilable California Supreme Court authority.

CONCLUSION

C.A.R. believes that this Court needs to step in and reassert its authority, and that of the United States Constitution, in the arena of temporary regulatory taking and remedies for these unanswered abuses. Failing to do so results in less protection under the Constitution to those owning real property in the State of California, and to those California jurists validly attempting to do justice in their courtrooms. Accordingly, C.A.R. urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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INTRODUCTION

No matter how vociferously the California Coastal Commission asserts that it only claimed jurisdiction over the rear of the Buckleys' lot, and therefore they were always free to build on the front part, the "STOP WORK" orders that the Commission repeatedly posted on the property tell the true – and very contrary – story. Each order (reproduced in the Appendix) states:

"STOP WORK STOP WORK STOP WORK STOP WORK

* * *

> "You are hereby notified to stop *all* unpermitted work. No grading or construction or landfill is permitted *on this property*. A *Coastal Permit* has not been issued for this project." (App., pp. 67, 68, 70, 71; underscore in original; italics added.)

The "Property Location" to which these orders applied was identified as "6815 Dume Drive" (App., pp. 67, 68, 70, 71) – not part of it, or half of it, but the property at that address, i.e., the entire lot owned by Mr. and Mrs. Buckley. The Commission's persistent attempt to deny this central fact colors its entire brief,[1] and renders its analysis of little utility. The Buckleys in fact *had* all the permits they needed. They got them from Los Angeles County, the only entity with the jurisdiction to issue them. They did not need a "Coastal Permit" from the Commission for anything. As each of the courts below plainly held, the Commission simply had no jurisdiction over any part of this property. And yet it insisted

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[1] See, for example, the Commission's assertion that it "acknowledged it had no jurisdiction" over the front half of the lot (Br. in Opp., p. 6), a statement that is bluntly belied by the Commission's own "STOP WORK" orders that forbade "all" work on "this property" for which no coastal permit had been issued by the Commission, to say nothing of the Commission's defiant assertion to the trial court that it would continue asserting its supposed "jurisdiction" throughout the appellate process (App., p. 50).

that it could order all work on "this property" to cease, and it enforced its will by threatening the Buckleys and their contractor with a $10,000 fine that would increase by another $5,000 *every day*. Those "STOP WORK" orders prevented all use (as the contractor understandably fled when each was posted), and thereby took the Buckleys' property.

In addition to this crucial factual gaffe, the Commission seeks to divert attention from the central legal issues by asserting that Mrs. Buckley is merely seeking to reargue *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006, *cert. den.*, 119 S.Ct. 179 (1998), rather than her own case. Not so. The case at bench was decided, as the Court of Appeal put it, "for better or for worse" (App., p. 30), under the compulsion of *Landgate*. It was not, as the Commission innocently asserts, "ancillary" to the decision. (Br. in Opp., p. 9.) To discuss this case, one has no choice but to discuss *Landgate*.

And there's the rub. *Landgate*, and perforce the case at bench that applies it, amounts to nothing less than defiance of this Court's holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). As quoted in the Petition, pp. 15-16, *First English* plainly decided that, where there is a regulatory taking of property, *the period of the taking encompasses the time consumed in litigation establishing that a taking occurred*. More than that, *First English* **reversed** California's contrary rule. (482 U.S. at 317.) But *Landgate* **reinstated** the California rule this Court explicitly struck down in *First English*, and the Court of Appeal applied it below.

This case, of course, adds the ugly wrinkle that the "regulatory" acts of the Commission were never legitimate regulation at all, but overreaching efforts of a government agency seeking to impose its will by a raw exercise of power – without jurisdiction – on citizens doing no more than trying to put their property to the perfectly lawful use of building their family home.[2] And they had to be knowingly

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[2] This is no advocate's hyperbole; the Commission has a track record. For a horrible example of its similar excesses, see *Healing v. California*

overreaching, even though the Commission persists here in disingenuously flogging its theory that it was authorized to retain jurisdiction over *part* of a lot if it was "environmentally sensitive." (Br. in Opp., p. 2.) The statutes are in the Appendix, at pp. 73-76. Ten times in the space of the two statutes the Legislature used the word "lot" in describing what was exempted from Commission jurisdiction. The Commission's careful lawyers and skilled staff could not have missed that. Moreover, when the County followed the statutes and declared the Buckleys' lot exempt, it referred to the "6815 Dume Drive lot" (App., p. 65), not a part of it. The Commission's insistence that it had a "legitimate dispute" with the Buckleys about its regulatory jurisdiction and was therefore making a "legitimate use of the judicial process" to resolve it (Br. in Opp., p. 8) is eyewash, and nothing more. Whatever the Commission did, the use of the term "legitimate" to describe it does violence to the English language.

I

THERE REALLY IS A PROBLEM WITH CALIFORNIA'S LAND USE JURISPRUDENCE. THE COASTAL COMMISSION, AS ONE OF ITS PRIME BENEFICIARIES, SIMPLY DOESN'T WANT TO ACKNOWLEDGE THAT IT EXISTS OR THAT NUMEROUS SCHOLARS AND JUDGES HAVE CALLED FOR CORRECTIVE ACTION

In the Petition, Mrs. Buckley presented ***not*** merely her (or her lawyers') views of California law. Rather, she collected for this Court the views of 20 nationally recognized

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Coastal Commn., 22 Cal.App.4th (1994) (property owner trying to build a home for his family got from the Commission what the court aptly characterized as "a long-term nightmare" [*Id.* at 1162]). It is worth noting that the Commission called the Healings' 17-year regulatory nightmare a "normal" delay in the planning process (*Id.* at 1171, fn. 7). Although Mr. Healing received some relief in that case, its limited precedential value has become nil after *Landgate*, which gutted the enforceability of such landowner rights as may have existed at the time.

authorities in the land use field – from all points of the scholarly spectrum, including some who bill themselves as "police power hawks" and openly favor strong governmental regulation of property. They all agreed that California's harsh treatment of property owners has become intense to the point of inspiring black humor among practitioners elsewhere in the country. (Pet., pp. 6-10, 18.) Mrs. Buckley also presented the analysis of three members of the California Supreme Court who have refused to go along with the intellectual rebellion by that court's bare majority that refuses to follow this Court's decisions on prime issues of federal constitutional law. (Pet., pp. 12-15, 18.)

The Commission's response is not analysis, but epithet. It calls Mrs. Buckley's presentation "a diatribe setting forth the petitioner's opinion of regulatory takings law in California" (Br. in Opp., p. 4), without deigning to mention any of the scholars or any of the Supreme Court Justices whose critiques and explanations of California practice were summarized in the Petition.

If there were any rational way to dispatch that collected wisdom, wouldn't the Commission have presented it? If any responsible voice disagreed, wouldn't the Commission have told the Court? But no. No citations; no defense; and no justice for property owners in California. That is why California's property owners need this Court's intervention. As aptly summarized in the Table of Contents of the *amicus curiae* brief of the National Association of Home Builders, the California Building Industry Association, the Building Industry Legal Defense Foundation, and the Home Builders Association of Northern California, the rules applied by California courts across a broad spectrum of land use law are uniquely contrary to settled constitutional decisions of this Court. If the Constitution is indeed to be the supreme law of the land, binding on "judges in every state" (U.S. Const., Art. VI, cl. 2), then it must apply in California, just as it does everywhere else.

II

MR. AND MRS. BUCKLEY WERE DENIED PROTECTIONS GUARANTEED BY THE 5TH AMENDMENT. THE COURT BELOW, APPLYING *LANDGATE* AND THE CALIFORNIA SUPREME COURT'S CLEAR MANDATE TO IGNORE THIS COURT'S 5TH AMENDMENT DECISIONS, HAS CREATED A TEXTBOOK CASE FOR THIS COURT'S REVIEW

The Buckleys' property was plainly taken by the Commission. Its actions prevented all use of the property, and its prevention of the Buckleys' landslide repair meant that the landslide eventually inflicted severe damage on the entire property. Even after the Court of Appeal held that the Commission lacked jurisdiction to regulate this property in any way, it denied any meaningful relief. There is no way that the Buckleys can be restored to the position they would have occupied without the Commission's actions. The landslide has permanently damaged the property. No development can even be attempted on the property without first designing a feasible remediation plan to mitigate that damage. Not to mention the years of lost use and the changes in the market.

The only meaningful relief after the ruinous impact of the Commission's actions would be formally transferring title to the property to the Commission (to legally acknowledge the fact that the property was *de facto* taken) and to compensate the Buckleys fully for the loss of their land. That is what the trial court did. (App., p. 59.) But the appellate courts took it away, leaving the Buckleys with an empty title to a damaged, unusable lot.

The actions of California's appellate courts are directly contrary to decisions of this Court like *First English* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), as Mrs. Buckley explained in detail in her Petition (pp. 12-19). The Commission's response is based on either its denial of the real impact of its serial "STOP WORK" orders that prevented the Buckleys from even repairing a landslide that was destroying their property, or a rendering of the

"California party line" about the meaning of *First English*, which is at war with what this Court decided.

First, the Commission's factual denial is flawed. The Commission says that, according to both itself (Br. in Opp., pp. 5, 6) and the Court of Appeal (Br. in Opp., pp. 6, 8-9), the Buckleys were not denied the use of their land because the Commission wrongly asserted jurisdiction only over the rear half of their lot and they could therefore have built a home on the front portion. Wrong. The argument ignores each of these things: (1) the Commission's repeated orders to "STOP WORK" on the entire lot; (2) the County's order to repair the landslide on the rear of the lot, which the Commission would not permit; and, as the Court of Appeal concluded, (3) the practical necessity of repairing the landslide before building on any part of the lot, in order to protect the anticipated construction and to protect neighboring property.[3]

Second, the Commission's legal denial is equally flawed. The Commission faults Mrs. Buckley for failing to show how the delays she and her husband suffered at the Commission's hands "were not 'normal delays . . . ' and therefore not temporary takings under *First English*. . . . " (Br. in Opp., p. 5.) This Court itself explained in *First English* that litigation is not a "normal delay" in the planning process:

> "In this case the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages *for the time before* it is finally determined that the regulation constitutes a 'taking' of his property. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution

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[3] Contrary to the Commission's assertion (Br. in Opp., p. 6), it is trial courts that determine facts in California, just like everywhere else. And this Court's decisions defer to such trial court fact-finding even when a state supreme court has reached different conclusions. (E.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 186-187 [1928].)

would *require compensation for that period*." (*First English*, 482 U.S. at 306-307; emphasis added.)

Under *First English*, litigational delay is part of the taking, not the planning process. Beyond that, the Commission's state of denial led it to assert that *Landgate* "is consistent with the teaching of *First English* that normal delays in the pursuit of legitimate regulatory goals do not constitute takings." (Br. in Opp., p. 9.) The audacity of that assertion is awesome. *Landgate* wholly undermines *First English*. It flatly contradicts *First English* by holding that the delay caused by litigation is always part of the "normal planning process" and therefore never compensable as a taking.

Contrary to the Commission's repeated assertion (Br. in Opp., pp. 6, 9, 10), this case is nothing at all like *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where this Court said that the mere requirement of seeking a permit does not effect a taking. *Here, the Buckleys obtained all the permits they needed from the only agency with the jurisdiction to issue them: the County of Los Angeles.* The Coastal Commission never had the jurisdiction even to consider issuance of a permit. In *Riverside Bayview*, the regulatory agency *had* jurisdiction. The Commission now before this Court did not. But for the Commission's wrongful assertion of jurisdiction, the Buckleys would have quickly repaired the unstable ravine before the landslide developed, built their home (or sold the lot), and gotten on with their lives. (Compare *Bowles v. United States*, 31 Fed. Cl. 37, 49 [Fed. Cl. 1994] ["The burden of plaintiff is to show that 'but for' the . . . government's action they would have been able to realize their plans for the property allegedly taken."].)

Thus, the Buckleys find themselves in the position of (1) holding title to property that (2) a government agency has officially prevented them from using for any economically beneficial purpose for (3) a period that now approaches 10 years while (4) having neither jurisdiction nor any legal basis for attempting to regulate the property at all. Under *Lucas*, *First English*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Commission took the Buckleys' property and the 5th Amendment mandates compensation. The California

appellate courts, reinventing the law to evade this Court's holdings, overrode the trial court's considered factual judgment that a taking occurred (based on evidence that included a view of the site) and held that the Commission's "mistaken" assertion of jurisdiction *could not* result in a taking, regardless of the impact on the Buckleys.[4] This Court's intervention is needed to provide justice to the Buckleys and to re-establish the 5th Amendment's primacy in California.

III

THE COMMISSION UNDERESTIMATES ITS POWER AND TENACITY

In an intriguing *tour de force*, the Commission argues (Br. in Opp., pp. 6, 9) that it never prevented the Buckleys from making productive use of the front half of their lot and, in fact, ever since the trial court entered judgment, they were free to do as they pleased anywhere.

Nonsense. Throughout its existence, the Commission has shown itself to be a formidable adversary – one that fights tenaciously and wins more often than not. California property owners prudently think twice before crossing the Commission.

For example, in *Whaler's Village Club v. California Coastal Commn.*, 173 Cal.App.3d 240 (1985), beachfront homeowners took emergency action to build revetments to

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[4] The cases cited by the Commission at Br. in Opp., pp. 10-11 appear to be cases in which the regulating entity had jurisdiction to issue permits, but erred in the process. In any event, even if they fully supported the Commission here (which they don't), the Commission would have done no more than expose a conflict among state courts on this issue. In each of the following cases, the courts decided that – consistent with *First English* – compensation was mandated for the time consumed by litigation that established the illegality of the regulatory action: *Cumberland Farms, Inc. v. Town of Groton*, 247 Conn. 196 (Conn. 1998); *Woodland Manor III Associates v. Keeney*, 713 A.2d 806 (R.I. 1998); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994); *Alexander v. Town of Jupiter*, 640 So. 2d 79 (Fla. App. 1994).

protect their homes from destruction by unusual, on-rushing winter storms. Because of the exigence of timing, they did not first seek the Commission's permission. The Commission pursued them relentlessly, seeking to confiscate their land and impose heavy fines. And the California courts saw nothing wrong with that.

In *Grupe v. California Coastal Commn.*, 166 Cal.App.3d 148 (1985), the Commission demanded that the owner of a 15,250 square foot lot dedicate 10,000 square feet of it (a stunning 65%) to the public as a condition to building a home on the truncated remainder. And the California courts saw nothing wrong with that.

The Commission has fought landowners tenaciously regardless of the environmental soundness of their projects. Two well-known commentators (whose sympathies generally lay with the regulators) described the Commission's performance with respect to the Sea Ranch, a widely acclaimed, environmentally superior project in northern California, as "a sad story." The details of that story, and of how the Commission delayed the project for a decade, while the cost of everything rose dramatically and innocent lot purchasers were prevented from building and left with nothing to show for their decade of carrying costs, may be seen in Babcock & Siemon, *The Zoning Game Revisited* 235 (1985).

Thus, when the Commission's lawyer told the trial judge in the case at bench that the Commission intended to continue asserting jurisdiction over the Buckley property until it ran out of courts,[5] they were justifiably concerned. The Commission's suggestion that they should have taken the risk that they would prevail on appeal, against the likelihood that the Commission would come after them for those $5,000 per day fines if they lost, rings hollow. Indeed, it is absurd.

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[5] "The Commission has represented to the Court, through its counsel, that it will continue to claim its jurisdiction until all appeals are exhausted." (App., p. 50.)

CONCLUSION

California has been fooling this Court. In its most recent regulatory taking case, this Court opined that:

> "[e]ven the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one." (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1644 [1999].)

Unfortunately, that "facially adequate procedure" is no more than skin deep; there is no substance beneath the surface. In fact, California property owners have no more remedy for regulatory takings than they did before this Court decided *First English*. In the words of a recent commentary, the California Supreme Court has "*foreclosed completely* the ability of persons who have suffered regulatory takings to obtain just compensation." (Ramirez, *The California Supreme Court's Foreclosure of the Compensation Remedy for Takings Claimants: Assessing the Effect of Recent California Supreme Court Opinions*, 8 California Law & Policy Reporter 193 [April 1999].) As shown in the Petition, the California courts have established their own parochial world, in which this Court's decisions are paid lip service, while the rights proclaimed in them go unenforced.

It is time to restore California to the Union. Mrs. Buckley prays that certiorari be granted, that California's rules be brought in line with this Court's settled jurisprudence, and that the compensatory judgment entered by the trial court be reinstated.

Respectfully submitted,

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THE WISCONSIN SUPREME COURT HAS RECENTLY ISSUED AN OPINION IN CONFLICT WITH THE ONE BELOW. WISCONSIN EXPRESSLY DECLINED TO ADOPT CALIFORNIA'S VIEW BECAUSE IT RECOGNIZED THAT CALIFORNIA'S VIEW CONFLICTS WITH SEVERAL DECISIONS OF THIS COURT.

As of July 7, 1999, California and Wisconsin are in conflict on the substantive issues raised in Mrs. Buckley's Petition for Certiorari. She therefore files this Supplemental Brief pursuant to Rule 15.8, to apprise this Court of the recent Wisconsin decision.

The case is *Eberle v. Dane County Bd. of Adjustment*, ___ N.W.2d ___, 1999 WL 457727 (July 7, 1999). The central fact is that Mr. and Mrs. Eberle were denied a permit which, in turn, deprived them of access to their property. That permit denial was legally invalid and was overturned by the Wisconsin courts. However, as here, after holding that the government's action was illegal, the lower Wisconsin courts held that no taking occurred and dismissed the claims for compensation.

The basis for dismissing the compensation claims was the earlier decision in *Reel Enterprises v. City of LaCrosse*, 146 Wis.2d 662, 431 N.W.2d 743 (Wis. App. 1988), *rev. den.* 147 Wis.2d 887, 436 N.W.2d 29 (1988), in which the court of appeals declared that an invalid regulatory act cannot be a taking within the meaning of the constitution – just as California's decision in *Landgate, Inc. v. California Coastal Commn.*, 17 Cal.4th 1006 (1998) held that "mistaken" governmental actions cannot be takings, even if they deny the landowner all productive use during the litigation over the regulatory act's invalidity.

The Wisconsin Supreme Court overruled *Reel*:

" . . . to the extent that Reel holds that no taking can result when a court reverses a decision of a governmental entity, Reel is incongruent with precedent of this court and the United States Supreme Court.

* * *

"The court in Reel cited no authority in support of its novel rule that reversal of an agency action by a court converts an action which otherwise might have been actionable as a taking into one which is not, and our research did not uncover any.

* * *

"More importantly, however, the Reel court's exclusion of actions reversed by courts from the pool of actions which might qualify as unconstitutional temporary takings is contrary to . . . the United States Supreme Court's decisions in First English [Evangelical Lutheran Church v. County of Los Angeles, 483 U.S. 304 (1987)] and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

* * *

"The Reel rule runs counter to these settled rules of law. . . . Under Reel, . . . the effect of the court's decision is to convert the taking, after the fact, into something which was not a taking, and thereby wipe out the landowner's ability to recover any just compensation.

"As such a result is not consistent with the law of takings established in cases of this court and the United States Supreme Court, we must

> overrule this holding in Reel." (Westlaw op., pp. 6, 7)

In their briefing, the Wisconsin regulators had urged the court "to adopt the reasoning of the [California] majority in Landgate . . . , that when an agency's erroneous action is reversed by a court, there is no taking, because such delay is just a part of the process of developing property." (Westlaw op., p. 13, fn. 25.) The Wisconsin Supreme Court, however, found *Landgate* unpersuasive, noting pointedly that "the argument of the majority in Landgate was clearly considered and rejected by the United States Supreme Court in First English. . . . " (Westlaw op., p. 13, fn. 25.)

Thus, the Wisconsin Supreme Court has joined the California dissenters in unmasking the California position for what it is: undeniably in conflict with the central takings decisions handed down by this Court in recent years. Moreover, Wisconsin's position now directly conflicts with California's, making the rights of California's residents something less than those enjoyed by their brothers and sisters in Wisconsin.

In light of this recent decision, the need for this Court's intervention is all the more evident. The confusion injected into 5th Amendment takings law by the California courts will continue to raise conflicts with other state courts of last resort, as well as with this Court. Mrs. Buckley therefore prays that Certiorari be granted

and California's law be aligned with this Court's paramount decisions.

Respectfully submitted,

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